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Vol. II

TRANSCRIPT OF RECORD

(Pages 481 to 813)

Supreme Court of the United States

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 8, 1945.

CERTIORARI GRANTED JANUARY 7, 1946.

No. 10419

United States

Circuit Court of Appeals

For the Ninth Circuit.

EDWARD F. ZAP,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

VOLUME II

Pages 481 to 774

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

HARRY CHAMPLIN.

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maury:

I reside at 430 South Sepulveda Boulevard, in Los Angeles.

Q. I understand you were employed by Mr. Edward F. Zap for some time?

I started my employment either the latter part of November, or the first part of December, 1942. I worked there until last October, I believe it was. I started my employment there as a draftsman, and then after the first of the year there had been some difficulty with the bookkeeper and Mr. Zap put me in charge of the books. I was given the title of comptroller. I wore a badge—it said "E. F. Zap Aeronautical Engineers, Harry Champlin, Comptroller." As auditor and comptroller, my duties were to take care of the books, generally. I am familiar with the books.

Q. Now calling your attention, Mr. Champlin, to this group of ledgers—checks, ledger sheets, bank statements.

The Court: As you examine each one of them, state for the record what the identification number is.

Mr. Maury: They are identification numbers 34 to 45, inclusive. [231-a] Are those the books that were under your supervision and direction?

(Testimony of Harry Champlin.)

A. Yes, sir.

Q. Are you familiar with all of them?

A. Yes, sir.

I recognize this document now marked 49 for identification; this portion of it, which the fourth page in the sequence in that document; this is the letter to which I have just testified.

(Thereupon, the Government read into evidence that portion of

EXHIBIT 49

designated by the witness which was and is as follows:)

"Office
E. F. ZAP
1005 Broxton
Los Angeles, Calif.

REF:Z-422-HD:1h
Restricted

E. F. ZAP
10976 Wilshire Boulevard
Westwood Village
Los Angeles, California
January 29, 1942

To: Resident Inspector of Naval Aircraft, U.S.N.,
Douglas Aircraft Company, Inc.,
El Segundo, California

Subject: Contract 83142—Flight Test on OS2U-1 Airplane Zap Folding Wing Version—Quotation on. [232]

Reference:
(a) Specification SR-38C

(Testimony of Harry Champlin.)

Enclosure:

(A) Map Report No. 135—Proposed Preliminary Flight Demonstration Schedule.

1. Since no provisions for preliminary flight demonstration were included in subject contract and since the project is entering the final stages of completion, the contractor has taken the liberty to investigate the possibilities of conducting the flight tests on the subject airplane and respectfully submits herewith a quotation covering the cost breakdown based upon the program outlined in Enclosure (A).

a. Chief Test Pilot's Fee & Insurance	$ 4,000.00
b. Flight Engineer Fee & Insurance	650.00
c. Ground Crew	900.00
d. Special Equipment Rental	320.00
e. Gasoline and Oil	180.00
f. Flight Engineering Reports Evaluation	2,900.00
g. Crash insurance	4,200.00
h. Ground Coverage Insurance 30 days	580.00
i. Public Liability and Property Damage Insurance	180.00
	$13,910.00
j. Contractor's Fee at 6%	834.60
Total Cost	$14,744.60

[232-a]

2. Tests outlined in Enclosure (A) will involve approximately 15-20 flight testing hours in Los Angeles area.

3. In accordance with Reference (a) para-

(Testimony of Harry Champlin.)

graph B-6, the contractor herewith proposes to employ Mr. Wm. H. McAvoy as chief test pilot, to conduct the tests outlined in Enclosure (A). Mr. McAvoy's long experience with the N.A.C.A. makes him particularly suited for this demonstration. In addition the contractor proposes to employ Mr. Harold E. Dale as flight engineer. Mr. Dale's position as assistant chief-engineer for this contractor qualifies him to direct the demonstrations outlined in Enclosure (A) and make observations useful to the Bu.Aero. It is the contractor's intention to make additional flights to determine results of various aileron-vane settings, tuft tests for observation of flow characteristics, take-off and climb tests involving various flap positions, and minor aerodynamic investigations and adjustments to enable the contractor to submit the subject airplane for final demonstration in its most advantageous conditions. For this reason it is highly desirable to have a flight engineer on all flights after the first pilot's familiarization flight.

(Signed) EDWARD F. ZAP [232-b]

I have seen Government's Exhibit 7 in evidence before. Mr. Zap gave me that document to collect $4,000 from the Navy; this was shortly before he went to Washington, D. C. on his last trip in October, 1942. On this occasion he said nothing more to

(Testimony of Harry Champlin.)

me than to hurry down and get this money through. I did so. I am familiar with Government's Exhibit 8 in evidence, a letter from the University of Washing, dated August 25, 1942. I saw it when it was delivered to the office of E. F. Zap in the regular course of the mail. At that time it did not have these pencil markings on it in the margins on both sides; those pencil notations are in the handwriting of Mr. Zap. On the carbon copy in Government's Exhibit 16 in evidence, the inked figures in handwriting were not on that document when I first saw it; I have seen it before in connection with the previous exhibit, Government's Exhibit No. 8. When I first saw it, it did not have those figures on it. Those figures are in the handwriting of Mr. Zap. I saw him put them there.

It was stipulated that Government's Exhibit 51 for identification is the original form which the defendants Exhibit AA was photostated.

By the Witness:

I am familiar with Government's Exhibit 51 for identification; it is a list of employees and their rates of pay; I am familiar with its function in the organization; [232-c] that was for the distribution of the productive labor and engineering hours so that they could be charged correctly into the books. These numbers at the top of the page are the different account numbers in accordance with the contract. The figures in handwriting after the names of the employees represent the rates of pay per hour;

(Testimony of Harry Champlin.)

they were made up by me and are in my handwriting; the names of two new employees at the bottom of the page are in my handwriting.

That sheet was made up for a period of six or seven weeks, during, I would say, sometime in August, September, October, it was mimeographed and made up by me to the extent described. It was then presented to Mr. Zap who marked on—under each account number where each man was working. The red figures and marks on Government's Exhibit 51 are in the handwriting of Mr. Zap.

Government's Exhibit 51 was then received in evidence.

Q. By Mr. Lavine: Now I show you a letter dated [232-d] Oct. 23rd, all members of Navy—of the engineering department, from Harry Champlin; is that your preparation and did you send that to all the members of the engineering department?

A. Yes, sir, yes, sir.

(Defendant's Exhibit GG was received in evidence, and read to the jury by Mr. Lavine.)

I am familiar with Government's Exhibit S in evidence, a letter from the University of Washington, dated August 25, 1942. I saw it when it was delivered to the office of E. F. Zap in the course of the mail. At that time it did not have these pencil markings on it in the margins on both sides; these pencil notations are in the handwriting of Mr. Zap. On the carbon copy in Government's Exhibit 16 in evidence.

(Testimony of Harry Champlin.)

The inked figures in handwriting were not on that document when I first saw it; I have seen it before in connection with the previous Exhibit, Government's Exhibit No. 8. When I first saw it, it did not have those figures on it. Those figures are in the handwriting of Mr. Zap. I saw him put them there. [232-e]

Q. By Mr. Maury: Mr. Champlin, did you ever get control of E. F. Zap's organization?

A. No, sir.

By the Witness: Mr. Zap called me over for some insurance figures regarding this flight test. There were several insurance figures. There was the insurance on the life of the pilot. There was insurance for the crash, and I think if I recall correctly ground coverage insurance. They were figures furnished me by an insurance underwriter. I don't recall how much those figures totaled. I would [232-f] hazard a guess—I don't recall, but I think it was somewhere around three or four thousand dollars. It may have been two or it may have been four. I don't know. That discussion or that request for those figures related to an estimate of the cost of insurance for the flight test. I had a typewriter of my own, and used to type up figures quite regularly, and statements from time to time on my own typewriter. And my customary way of typing was to type with caps—not always, no—I wouldn't say a great deal, no. No, I think I would use lower case letters more. [233]

(Testimony of Harry Champlin.)

Los Angeles, California, Wednesday, April 14, 1943.
9:00 A. M.

Harry Champlin,

called as a witness by and on behalf of the Plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination
(Resumed)

By Mr. Lavine:

In connection with all these books and records which I kept from time to time, those were always open for inspection. Mr. Zap did instruct me to conceal books of account. In September, 1942, Mr. Zap told me I was not to show these books to the Navy auditors again; that if the Navy auditors wanted to see anything, they were to come to him and he would tell them what he wanted to.

I believe I told Mr. Byars about that after the whole thing came out, about the time of Mr. Zap's arrest. I never did conceal any books from Mr. Byars at any time.

In addition to Mr. Byars, other Navy auditors around were a Mr. Ted Balzer, and I believe Mr. Greenfield; a Lieutenant Minor; there was another Navy auditor—I just can't recall his name at the present time.

Mr. Balter: Last night the witness said he was tired and could not speak up, now this morning he is not tired and I still cannot hear him, and I have

(Testimony of Harry Champlin.)

moved up here where I [234] hoped to hear him.

The Court: You will have to speak louder.

The Witness: There was one other Navy auditor, I don't recall his name at the present time. There were at least five Navy auditors making inspections in there; they were making cost inspections. Mr. Greenfield was there for a considerable period of time but the exact time I couldn't say. Mr. Byars was the man that had charge of those books. I don't believe Mr. Greenfield spent weeks there. I was there, yes. He sat outside so I didn't see what he was doing.

By Mr. Lavine: Let's get down into the month of June, July, August and September of 1942.

The Witness: I am not sure, but I don't believe Mr. Greenfield was there during June. Navy Inspectors Mr. Balzer and Mr. Byars were there. I saw them auditing the books. I saw them check up on the various items, item by item, in the books. It was a matter of days they spent checking item by item. Then after they finished the auditing of those books they turned them back to Mr. Browne; he had charge of them—Mr. Cedric Browne, the certified public accountant, that I refer to now.

During the month of September, 1942, I knew they were auditing the books, and I knew they were making a check of the accounts. I couldn't tell you how much time they spent [235] because they were working under Mr. Browne. I know they were there. I believe Mr. Greenfield was there during

(Testimony of Harry Champlin.)

the month of September. They checked through the books and made their audit; then turned the books back to Mr. Browne, that is what I understand.

At that time different auditors, they came in: there was Mr. Byers, Mr. Balzer, and then there were two other Navy auditors, I cannot remember their names.

From July on until Mr. Zap's arrest in November, I signed all the C4 forms. Those C4 forms were made out in accordance with the books. I made out my request under C4; that is, I signed the request and then submitted it to a Navy [235-a] auditor. That Navy auditor would either approve it or disapprove it. Now, after he would approve of it he would send back a C5 form. I don't remember just the sequence of the numbers but I believe it was a C5 form that they sent back. And then I would turn that over to Mr. Browne for instructions as to what to do. When that came back they never came back to me, they came right directly to Mr. Browne, and then Mr. Browne directed how the items should be billed. As to the bills being made out on a pencil notation and Mr. Browne telling us how to make out the bills, they didn't come back to me, so I just don't know the form they took.

I couldn't give you a proportion, but the actual entries are in my handwriting in the books there. All of the entries were not made by me but I did make a good many of them, and then there are some entries made by Mr. Cedric Browne, a certified

(Testimony of Harry Champlin.)

public accountant, from July until September Mr. Browne and Miss Boyle made the entries.

I don't recall whether I typed Exhibit 19, this charge here for flight test at Daggett. I remember writing out this in longhand and I believe somebody else typed it. I didn't make up the C4 forms. I believe I did sign a C4 form asking that the item be examined for audit.

Q. By Mr. Lavine: And you recognize the pencil notations of Mr. Cedric Browne?

A. I do not.

Q. Is that the pencil notations of Mr. Cedric Browne? A. Yes, sir. [236]

Q. And this is the form C.A.S. 5 you were using—that the Navy was using in connection with the business of Edward F. Zap? A. Yes, sir.

Mr. Lavine: I offer this in evidence as the defendant's exhibit next in order.

The Clerk: HH for identification. HH into evidence?

Mr. Lavine: Did you have an argument with Mr. Zap in July, 1942?

The Witness: We had small disputes all along. [237] Subsequently, before Mr. Zap left for Washington, he put Mr. L. E. Weaver in charge. I may have asked Mr. Zap when he put L. E. Weaver in charge whether Mr. Weaver was going to be over me. I don't remember asking it, but it is possible that I did.

Q. And then after Mr. Weaver was put in charge

(Testimony of Harry Champlin.)

you went to Mr. Weaver's draft board and told them to lift his classification, did you not?

A. No, sir.

The Witness: Mr. Weaver was left in charge, and by this time I was aware of the mis-charging in the books in accordance with Mr. Zap's instructions.

Mr. Lavine: I object to that.

The Court: Just what you said. The question of counsel is what you said to these people.

The Witness: I took Mr. Weaver and showed him——

The Court: All right. Talk to the jury.

The Witness: Showed him the books and let him draw his own conclusions.

The Court: Now, that is all you did, was it?

The Witness: At first, and then they drew in the men and talked the whole thing over, and I told them just how matters stood.

Q. By Mr. Lavine: You said at that time, didn't you, to several of the employees, that you were going to be in [238] charge of the Zap plant?

A. I don't recall saying that; no, sir.

Q. Isn't it a fact that on the very day that Mr. Zap was arrested that you posted a notice in the place and you told various employees that you were then in complete charge; and you were going to be the boss from then on?

Mr. Binns: I object to that as a compound question, your Honor.

(Testimony of Harry Champlin,)

The Court: Yes, too many things involved in it. I will permit the question if it is split up; and also, counsel, you should present the notice, if you have it, to the witness.

Mr. Lavine: I haven't it.

The Court: Has the Government the notice?

Mr. Binns: No.

Mr. Maury: I never heard of it before, your Honor.

The Court: Ask the question first, just split it up, counsel.

Q. By Mr. Lavine: Did you post a notice to the various employees?

The Court: On the day Mr. Zap was arrested.

The Witness: I believe Mr. Weaver posted a notice.

Q. By Mr. Lavine: Did you post a notice? I didn't ask you about Mr. Weaver.

A. I don't remember that. I don't believe I did.

Q. You don't remember that? [238-a]

The Court: Now, he has answered it. He said he didn't.

Mr. Lavine: All right. Exception.

The Court: You see, it is an argument with counsel. Proceed.

Q. By Mr. Lavine: You told the various employees then that you were going to be in charge, didn't you?

Mr. Maury: Objected to, to various employees

(Testimony of Harry Champlin.)

makes it a compound question. No time or place fixed.

Mr. Lavine: B. C. I am talking about the time he posted these notices on November 5, 1942.

The Court: I will permit the question. Go ahead. Did you tell any of the employees there you were going to be in charge, is counsel's question?

The Witness: Yes, and I would like to explain.

The Court: Go ahead. Explain.

The Witness: Commander Smith, and the Navy Intelligence, when Mr. Zap was arrested, told me——

Mr. Lavine: No.

The Court: No, no, you can't tell that.

The Witness: ——said I was to be——

The Court: No, no.

The Witness: I am sorry.

The Court: You can't do that. That is hearsay, anything they told you. This now is what you told the employees, any of the employees about being in charge.

The Witness: I told them I was there in the Navy's [238-b] interest.

The Court: All right. Anything else? Counsel's direct question is did you tell them you were in charge of the business? That is Mr. Lavine's question.

The Witness: I didn't tell them I was in charge of the business; no, sir.

The Witness (continuing): I told the various em-

(Testimony of Harry Champlin.)

ployees then that I was going to be in charge. I would like to explain. I told them I was there in the Navy's interest. I didn't tell them I was in charge of the business; no, sir.

Q. By Mr. Lavine: You told them you were going to run the place from then on, and they had to take orders from you?

A. No, I don't think I said that.

Q. I will ask you specifically if you did not on that occasion tell Miss Ethel Boyle you were now in charge and that she would have to take orders from you?

A. No, I don't think I said that; no, sir.

Q. I will ask you if you didn't state specifically to Marion Israel you were the boss from now on?

A. No, I don't recall saying that either.

Q. I will ask if you didn't state to Mr. L. E. Weaver that you were in charge?

A. May I ask in charge of what? [238-c]

Q. In charge of the business, in charge of the office and in charge of the business.

A. No, I don't remember saying that to Mr. Weaver there.

Q. You remember that Mr. Zap called up on the telephone? Did you answer the phone?

A. No, sir.

Q. In the presence of Mr. Myerson, of the F.B.I.; Mr. L. E. Weaver, and yourself, Mr. Weaver received a phone call and then turned to you and

(Testimony of Harry Champlin.)

said—and said, "You are fired. Mr. Zap has fired you"? A. I recall that.

Q. And didn't you then state, "He can't do that to me. I am in charge," or words to that effect?

A. I believe, yes. May I explain that, your Honor?

The Court: Yes.

The Witness: I was requested to look out for the Navy's interests, that nothing was removed.

Mr. Lavine: I object to that as a self-serving statement.

The Court: Did you say this to Mr. Weaver?

The Witness: I told Mr. Weaver that Commander Smith told me to stay there and see Mr. Zap's men removed nothing from the office.

The Court: All right.

The Witness: I was in charge to see that nothing was removed from the offices.

The Court: That was a part of the same conversation [239] as counsel referred to with Mr. Weaver?

The Witness: Yes, sir, that is correct.

The Court: All right. Go on.

Q. By Mr. Lavine: And didn't Mr. Myerson, of the F.B.I., then state to you that Mr. Zap is still in charge of the business, and you will have to obey orders of Mr. Zap?

A. I believe Mr. Myerson did say that; yes, sir.

Q. And then didn't you then and there continue

(Testimony of Harry Champlin.)

to remain for a little while in spite of that order and refused to get out?

A. I don't know that I refused to get out. I did leave a little later.

Q. Then you came back again, didn't you?

A. Oh, yes, I came back.

Q. As a matter of fact, you put in a claim for wages for that particular time, didn't you?

Mr. Binns: I object to that, your Honor.

The Court: That is sustained.

Q. By Mr. Lavine: Isn't it a fact, you appeared before the State Labor Commissioner sometime in November or December of 1942, in the presence of the State Labor Commissioner, and Mr. Zap, and demanded wages for this period of time?

Mr. Binns: I object to that question.

The Court: Sustained. I don't think that has got anything to do with this case. Let's try one case at a time. [240]

Mr. Lavine: I want to bring out his interest or bias.

The Court: I am not going to try a labor case here.

Mr. Lavine: No, your Honor, but I want to bring out his animus.

The Court: I permitted you to go at great length, counsel, and you know what matters are entirely outside the record.

Mr. Lavine: I think this is important. May I make an offer of proof then, your Honor?

(Testimony of Harry Champlin.)

The Court: Yes, you may make an offer of proof.

(The following proceedings were had at the bench outside the hearing of the jury:)

Mr. Lavine: I offer to prove at this time that the witness, Mr. Champlin, appeared before the State Labor Commissioner and in November of 1942, and Mr. Champlin, and Mr. Zap, and Mr. Devore, and the State Labor Commissioner, being present; and at that time he made a demand for wages covering this period of time when Mr. Zap had been in the East, and for the subsequent period after he was discharged; that in that proceeding Mr. Zap stated he was not entitled to receive any money for this period of time, and that Mr. Devore stated that he could not be paid for that period of time; and he said that he was working, and in proof of that he produced checks on the E. F. Zap Company, which he himself had signed, and which were not signed by Mr. Zap; he produced those checks in support of his alleged claim for the time [241] that these occurrences were going on, immediately after Mr. Zap left and while he was gone East and after he returned.

Mr. Maury: To which the Government objects as immaterial, irrelevant, incompetent, outside the issues, and indistinct and vague as to time.

The Court: It is the opinion of the court that you cannot show bias and prejudice because of

(Testimony of Harry Champlin.)

dispute between an employer and an employee about wages; certainly any employee can bring an action to recover wages, and the employer can dispute it; and the offer of proof here does not show anything about a dispute between Mr. Zap and this witness with reference to wages. All right.

Mr. Lavine: The hostility and state of mind of Mr. Champlin. Exception noted.

The Court: There is absolutely no hostile state of mind shown in this offer of proof, according to this court; and the court wants to repeat again that he cannot see how you can infer a hostile mind when a laborer brings an action to recover wages against his employer; he has that right, and every laboring man has, and the right of an employer to resist it if it is not fair. Exception allowed to defendant.

(Further proceedings were now resumed within the hearing of the jury, as follows:)

The Witness: After Mr. Zap went to Washington and for the two weeks subsequent thereto, or at least until November 5, 1942, when he returned, I held frequent conferences [242] with people in the office. I believe I told various employees in the office that Mr. Zap was going to be arrested, yes, sir.

Q. By Mr. Lavine: And you told them that he was going to go up for 163 years, or words to that effect?

The Witness: No, sir.

Mr. Binns: I object to that, your Honor.

(Testimony of Harry Champlin.)

The Court: He says he didn't.

The Witness: I made out an affidavit for a search warrant for the F.B.I. I don't recall whether it was an affidavit to search his place of business, or his home.

Q. By Mr. Lavine: As a matter of fact, you made three affidavits, didn't you? I am not going into the substance, your Honor, just the fact that he did do such an act.

Mr. Maury: I will stipulate it is a copy of the original, and is in possession of the United States Commissioner's files, Mr. Lavine.

Q. And you told the employees while you were doing this that after Mr. Zap's arrest you were going to be in charge of the business?

A. I don't remember making such a statement, Mr. Lavine.

Mr. Hanley and I made a trip to San Diego while Mr. Zap was gone. We saw Captain Zeigler in San Diego. I made a trip to see Commander Smith and I saw Commander Smith in company with Mr. Hanley.

Q. By Mr. Lavine: Did you do that at your own expense [243] or at the expense of Mr. E. F. Zap?

A. That is a rather difficult question to answer. I would like to qualify that, please.

Q. Did you pay your own expenses or did you charge it to E. F. Zap?

The Witness: I don't know who has paid for

(Testimony of Harry Champlin.)

that trip to San Diego, I don't know: I went in Mr. Hanley's car and I don't know that Mr. Hanley has been reimbursed for the mileage, or anything.

The Court: Just yourself: did you receive any money for expenses?. Did you receive any money for expenses from Mr. Zap? That is the question.

The Witness: No, I didn't.

The Court: All right.

The Witness: No.

Q. By Mr. Lavine: Did you receive any money for reimbursement for your trip to Commander Smith's office? A. No, I don't believe I did.

Q. By Mr. Lavine: Did you ask Mr. Hanley at that time to phone to Washington and see what arrangements could be made to take over the business of Mr. Zap, on or about October 27, 1942, during Mr. Zap's absence?

The Witness: I don't recall I was the particular instigator in that telephone call—no, sir.

Q. By Mr. Lavine: You heard such a telephone call made, didn't you? [244]

A. I know such a telephone call was made: yes, sir.

Q. And you okehed the bill for the payment of that telephone call, didn't you?

A. I okehed a bill for payment of a telephone call to Mr. Harold Dale, from E. W. Hanley, to Washington, D. C.

Mr. Lavine: I now offer this as next in evidence.

The Court: It will be received.

(Testimony of Harry Champlin.)

(The document heretofore marked for identification as Defendants' Exhibit II was received in evidence.)

Mr. Binns: I object to the introduction of that in evidence, your Honor. It is not plain to me that is connected with the telephone call that the witness just testified concerning.

The Court: Clear it up, counsel. You may ask the question. Clear it up.

Q. By Mr. Binns: Mr. Champlin, you have just testified concerning a telephone call which Mr. Hanley made to Washington? A. Yes, sir.

Q. Counsel has just shown you a receipt?

A. Yes.

Q. Is that the bill for the telephone call which you have just testified about to Washington?

A. I believe it is.

(The document referred to was received in evidence and marked Defendants' Exhibit JJ.)

[245]

The Witness: I did not at any time notify Mr. Zap that I heard rumors that he was about to be arrested.

Recross Examination

By Mr. Lavine:

The Witness: With reference to the defendant's exhibit GG in evidence, the condition I described in that exhibit existed from the first day that I went in there to take care of the books; I wish to say a

(Testimony of Harry Champlin.)

word about that: the unbalance between the cost price and the fixed fee ledgers was so apparent, but not being an engineer, I didn't know how these men's time should be charged, so I asked Mr. Weaver and Mr. Weaver went around and inquired from the different men and this was drawn up as a result of that.

/

HILTON JACK BYARS,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

By Mr. Binns:

I am employed at the office of the Cost Inspector at the Timm Aircraft Corporation and Interstate Aircraft and Engineering Corporation, as senior accountant. I was senior accountant at the office of the cost inspector at Douglas Aircraft Corporation, and the cost inspection of E. F. Zap was under the cognizance of that cost inspector.

I entered into that position May 25, 1942. I first [246] visited the Zap establishment some time in the first of June, 1942. I would say some time within the first 15 days of June.

(Witness describes E. F. Zap's offices and building): I wouldn't specifically call any one of them the main office. I would call that the front office. The one maybe you have reference to now is the side office, the one on the south side, where the drafts-

(Testimony of Hilton Jack Byars.)

men were. To the best of my recollection mostly in the side office there were draftsmen's tables, with the exception of one desk, somewhat in the center of the [246-a] room, that was occupied by Cedric Browne, the accountant, the auditor for the company. The books were kept both places, so far as I know. I mean they were sometimes at one place and sometimes at another. Generally speaking they would be kept either at Mr. Browne's or Miss Boyle's desk. That might not always hold true. They might possibly be anywhere within the office, anywhere in the organization.

Q. Now, then, you have another office. I think you have referred to it as the back office.

A. I can give you a general idea about September or October, 1942.

Q. By Mr. Binns: In September or October how were the desks arranged in that office?

The Witness: The first desk after you go in the door was a desk occupied by Mr. Champlin, and then flush against that but facing in the opposite direction was the desk occupied by Mr. Hanley; and then facing in the opposite direction, about four or five feet away from Mr. Hanley's desk, was Harold Dale's desk; then flush against that, but facing in the opposite direction, was Mr. Zap's desk.

Then on the side, that would be the east side, there was, I believe it would be called a draftsman's board, or a saw-horse, or whatever you call them there; and just south of that, up towards the door,

(Testimony of Hilton Jack Byars.)

would have been the safe and maybe some other cabinets or something I wouldn't recall exactly.

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In connection with my duties as a civilian auditor for the Navy, I audited the books of E. F. Zap. The period of time during which I audited his books would be approximately from some time during the first part of June, until some time during October or November.

The Navy had assisting me in that audit, part of the time, in 1942, Theodore Balzer, Navy Auditor. Then at various times additional ones from the office from which I worked would assist. Among those were Greenfield, Sam Quint, and Douglas Reevers, John C. Watkins; and I don't recall every one that did any work at all on the audit. All those men whose names I have mentioned would have worked under me in the conduct of an audit at Mr. Zap's. I have conducted audits at Zap's office. I work under Lt. Minor.

It wouldn't be a regular procedure, depending on the type of audit to be made. An overhead audit, so-called, might be made once every six months or three months, and cover the entire period in one audit; that is maybe it would take two or three weeks, or whatever it might take. An audit of a payroll for one week, for instance, might be done every week, and might be done at two week periods. There was no regular procedure. That is, we didn't always audit for the same period at each audit. I

(Testimony of Hilton Jack Byars.)

personally participated in the two types of audits I have described. I personally participated in audits in connection with the Navy control account. I personally participated in audits in connection [248] with cost-plus fixed fee contract items.

Q. Now, then, Mr. Byars, I am going to ask you to examine a group of exhibits that have been marked for identification and identified as books of E. F. Zap, and trace certain items for us through those books.

Government's Exhibit No. 52 for identification is the check mentioned in Government's Exhibit 26 in evidence. It would not necessarily have been audited in the audit of Government's Exhibit 26.

(Government's Exhibit 52 was received in evidence.)

I have seen Government's Exhibit 26 in evidence before; it was submitted to my office. In regard to Government's Exhibit 26, I refer to certain memoranda that I have.

Voir Dire

By Mr. Lavine:

The Witness: This particular memorandum was made on the 24th of November 1942. I certainly did not make this at the time these various items were being entered. The schedule was prepared after both September and October had passed and was not necessarily a chronological recordation of these items.

(Testimony of Hilton Jack Byars.)

Redirect Examination

Resumed by Mr. Binns:

The Witness: In order to definitely identify the par- [249] ticular items, I will have to add them up and see when I get this total to identify this particular item.

The Court: Let the record show Mr. Lavine's objection is on the record, and Mr. Lavine's objection is overruled and exception allowed Mr. Lavine. All right. Proceed.

Mr. Lavine: In order that our record may be complete, it would be on the grounds there is no foundation; that it is a conclusion of the witness; and that it is not the best evidence. On the other grounds which we had heretofore stated, and exception noted.

Q. By Mr. Binns: Mr. Byars, can you tell us if, among these items included in Exhibit 26, was an item of reimbursement for payment to the University of Washington for wind tunnel expenses in the amount of $1906 and some odd dollars?

A. There is a payment included in $1909.62.

Q. I see. And can you look at the books and records of Mr. E. F. Zap and see if such an entry is made on his books?

Mr. Lavine: I object, and an exception to the ruling?

The Court: Yes.

The Witness: There is an entry in Exhibit 38, page IR-10, in the amount of $1909.62, under the

(Testimony of Hilton Jack Byars.)

column 26-0; it was subsequently posted to Exhibit 41, page 1, of clearance [249-a] account 26-0, under date of September 30, University of Washington, $1909.62.

Q. Now, can you look at the invoice record and tell us the figure $1909.62 represented a total of an invoice received, or only a part of an invoice received?

A. The invoice record, Exhibit 38, indicates that it is a part of an invoice for $5,295.56.

Q. Can you look at the books and records of Mr. Zap and tell us wherein was charged the balance of the invoice for 5,000 some odd dollars?

A. It is charged in Exhibit 38, on page IR-10, under account 3-0, $3,385.94, and that was posted to the Exhibit 41, page 1, of account 3-0, and under date of August 28th, University of Washington, $3,385.94.

Q. Exhibit for identification, 41, is entitled "Job cost record;" now, can you tell us whether that is job cost ledger cost plus?

Mr. Lavine: I object to that as calling for the conclusion or opinion of the witness. He did not make the ledger and it was not kept by him.

Mr. Binns: He has audited the books.

The Court: Just what the books show. Just limit it to that.

The Witness: All the accounts in this ledger, Exhibit 41, were used to accumulate charges under

(Testimony of Hilton Jack Byars.)

the cost plus fixed fee portion of both contracts; that is, under 83142 and NXs- [250] 4105.

Q. By Mr. Binns: Can you go back to the invoice record and find that item for five thousand some odd dollars? A. Yes, sir.

Q. Is there a notation that item is charged to an account, or to an item known as project 15?

A. There is none. In connection with my auditing of the books of Edward F. Zap, Aeronautical Engineers, there was an account known as project 15. Such account appears in Exhibit 40, the page is unnumbered; it shows—here is a writing on page number—page 2, payroll. From October 8, 1942, to October 14, 1942, there is a column headed "Project 15. Account 50-0." The total of that column is $103.46. It was next entered in Exhibit 39, under account 200, entitled "factory ledger plant 2." Under date of October 23rd, and the notation is project 15—50-0—$103.46.

Q. Now, then, Mr. Byars, is there any other entry previous to the period October 8th—pardon me—October—previous to October 23rd, wherein that account appears? Pardon me—that item appears?

A. That item? Do you mean the $103.46?

Q. No, I mean project 15.

A. In Exhibit 39, account 11, the work in process, job cost ledger, shows under account 50-0, an amount of $283.79, under date of October 31st, a total of that column, accumulation of charges to that account, is $289.76. [251]

(Testimony of Hilton Jack Byars.)

I understand you to mean in the job cost ledger was there an account, in this particular job cost ledger, showing the details of the charges. What I have reference to there is no such account in there, to my knowledge. I never saw one during the course of the audit.

This bill of $283.79, which appears in the account "Work in Process," in Government's Exhibit 39 for identification was posted from Exhibit 38, page J-62, which is the journal, transferring that amount, $283.79 from the account factory ledger to "Work in Process Job 50-0."

As to any other entry prior to 10-31-42, which concerns project 15 in the books of E. F. Zap, there is an entry in Exhibit 40 that was previously referred to, that is page 2, payroll period from October 8, 1942, to October 14, 1942; that is $103.46, covering that one week's payroll, the same exhibit 40, this page is not numbered, but says "Payroll, period from October 15, 1942, to October 21, 1942," which would be the subsequent week—there is an amount of $180.33, under project 15, 50-0.

Project 15 does not appear upon the books and records of E. F. Zap prior to October 8, 1942.

With reference to Exhibit 25 in evidence, and particularly the 3rd page thereof, (the substance of which was read to the jury), that item was attached to Exhibit 25 when it was received in my office. This item was handled in the [252] same manner as the 4th page of Exhibit.

(Testimony of Hilton Jack Byars.)

By Mr. Lavine:

The Witness: That exhibit came to my office in the form that it is here; all of the documents now attached were altogether at my office and I saw them there.

Looking at the books and records of Mr. Zap I find that the item represented by page 3 of the Exhibit 25 appears thereon in Exhibit 38, CR page 42, check No. 260 in the amount of $500 to E. F. Zap, preflight test, that shows also in Exhibit 41, page 1, of the account 3-10, E. F. Zap, tunnel test, with the posting reference Cr-42, $500.

That entry is in connection with the entry I previously traced, namely, the invoice received from the University of Washington in the amount of five thousand and some odd dollars.

In connection with Exhibit 30 in evidence which now is read to me as follows: "Public Voucher, for cost plan contracts, 11th Naval District, San Pedro, California," the one line "schedule C, 1675.81, A part of a total of $10,829.77. Document 10, Schedule C, Edward F. Zap, schedule of direct charges, contract NXs-4105."

Reading from one line on that page "June 29, 1942, electric power and wind tunnel, $500." Now, reading the 17th, "Edward F. Zap, 1005 Broxton Avenue, West Los Angeles, California. June 29, 1942. Invoice. Sold to United States of America Navy. We charge your account with a direct charge [252-a] as follows: May 8, 1942, reimburse-

(Testimony of Hilton Jack Byars.)

ment E. F. Zap for advance to power company for power used at the University of Washington, Seattle, Washington, wind tunnel, in ascertaining certain vital stress information in connection with item 1, lot 2, of contract NXs-4105. By paying power bill direct a substantial saving in the wind tunnel charges was made—$500. Certified correct and just payment not received. Edward F. Zap."

I examined the books and records of E. F. Zap and ascertained that public voucher No. 2808, the first page of Government's Exhibit 30 in evidence, was in Exhibit 38, page No. C-70, which is the record of cash received. Under date of July 11, 1942, there is an entry of cash received, $10,829.77, United States Navy, and it is credited to the accounts receivable, U. S. Navy, that being the same amount as the voucher Exhibit 30.

This check, dated May 9th, payable to E. F. Zap in the amount of $500, marked Exhibit 37 in evidence, appears upon the books and records of E. F. Zap in Exhibit 38, CR-48, check No. 384, amount $500, with the notation "reimbursement E. F. Zap, account of wind tunnel test, design job 261." That entry was next posted to Exhibit 41, page 41, of 26-1, under date of May 8th; notation, E. F. Zap, wind tunnel test, $500.

That sum was withdrawn from that amount and posted elsewhere as follows: "In Exhibit 38, page J-38, is an entry charged accounts receivable, U. S. Navy, $10,829.77, and [252-b] credited to Navy bill

(Testimony of Hilton Jack Byars.)

cost, contra, $884.82, $8,814.24, which total $10,829.77. The distribution of those three amounts are account 26-0, 26-1, 26-2; that amount is the same amount as the voucher which included the $500 item.

Check No. 2502, of Exhibit 37 in evidence in the amount of $1,000, dated July 15, 1942, payable to E. F. Zap, appears upon the books and records of E. F. Zap in Exhibit 38, page CR-52, check 2502, $1000; E. F. Zap wind tunnel expenses.

This was next posted to Exhibit 41, page 2, of account 26-1, under date of July 15th, E. F. Zap wind tunnel expenses, $1000.

This check was received as Government's Exhibit 35 in evidence.

Concerning the sheet in Exhibit 37 in evidence, starting "Certificate of withdrawal from Navy control account, contract NXs-4105," I have seen that before both at my office and at Mr. Zap's office. The check which has just been admitted in evidence in the sum of $100 is included in this check No. 1.

Neither this item of $1000, which I have just described, nor the previous item of $500, which was part of Exhibit 30, were a part of the bill which was received from the University of Washington.

With reference to Government's Exhibit 53 for identification, this is the item which accompanied Government's Exhibit 37. [252-c]

(Government's Exhibit 53 was received in evidence.)

(Testimony of Hilton Jack Byars.)

Q. By Mr. Binns: Mr. Byars, I show you Government's Exhibit 19 in evidence, calling your attention to the second page thereof, which reads as follows: "Public voucher for cost plus contracts. No. 36062." And then skipping down a ways, for work on a cost plus and fixed fee basis, under contract, then October, 1942, other direct charges, $4,300.

Can you look in the books and records of Mr. E. F. Zap and ascertain whether the public voucher, which is the second page of Government's Exhibit 19 in evidence, was paid by the Navy to E. F. Zap?

[2-d]

A. In Exhibit 38, page C-23, which is a record of "Cash received," is an entry under date of October 24th, accounts receivable, U. S. Navy, 83142, entry No. 40, $4,300.

Q. Can you trace that entry back into the account from which it was posted?

A. That entry is posted to Exhibit 39 as a part of a total amount of $45,407.42, to offset the charge of $4,300. I identified this account as No. 6?

Q. No.

A. This amount was posted to the account Exhibit 39, page 6, is a part of a total amount of $45,407.52. The step before that was Exhibit 38, page J-60, record of journal entries, is an entry charging accounts receivable $4300, accounts receivable, U. S. Navy, and crediting Navy cost/bill, contra, job 3-15, $4300; that Navy cost bill, contra,

(Testimony of Hilton Jack Byars.)

is the offset to the charges to these accounts in the job cost ledger under the previous account numbers, 3-15 being one of them.

Q. Did that item appear in 3-15?

A. Yes, in Exhibit 41, page 1, of 3-15 is an item of $4,000, under date of October 2nd, with the date in parenthesis 9-23-3, William H. McAvoy, $4,000. There is an additional amount under date of October 9th, E. F. Zap, $250. There is an additional amount under date of October 13: petty cash, $114.97, which included a $50 item which, with the other $250 and the $4,000 makes up the $4300 item.

[253]

Q. I show you this check in the amount of $4,000, which is Government's Exhibit 7, and ask you is that the $4,000 item which represents the item you have just read? A. It does.

Q. These two checks have been withdrawn from the Exhibit 7. May I have them specially marked, Government's Exhibit 37 for identification?

The Clerk: These two checks here, Government's Exhibit 37 for identification.

Q. By Mr. Binns: Mr. Byars, I show you this check marked 37 for identification in the amount of $250, and ask you is that the check which supports the $250 item you have just read? A. It does.

Mr. Binns: Could that be admitted in evidence at this time, your Honor?

The Court: It may be.

(The document heretofore marked for identi-

(Testimony of Hilton Jack Byars.)

fication as Government's Exhibit No. 37 was received in evidence.)

Q. By Mr. Binns: Now, then, Mr. Byars, did you conduct an audit before the issuance of the public voucher, which is the second page of Government's Exhibit 19 in evidence? A. I did.

Q. In connection with that audit was the fourth and fifth pages of Government's Exhibit 19 submitted to you by [254] the E. F. Zap Company?

Mr. Lavine: I object to that as irrelevant, incompetent and immaterial.

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: In connection with my audit of that voucher the fourth and fifth pages of Government's Exhibit 19, in evidence, were received by our office in the regular course of business. Looking at a sheet of paper on the letterhead of E. F. Zap, Government's Exhibit 6 for identification, that document was also received by our office in the regular course of business in connection with the audit, the second page of the Exhibit 19 in evidence.

Mr. Binns: I would like to read these three documents to the jury, if I may, your Honor.

(Reading)

"October 16, 1942. Edward F. Zap, 1005 Broxton Avenue, West Los Angeles, California. Invoice 51. Sold to the United States of America—Navy, contract 83142. We charge your account with direct charges as follows:

(Testimony of Hilton Jack Byars.)

Direct charges as per list V-73, $4,300. Certified correct and just payment not received. Edward F. Zap."

"I, Edward F. Zap, do hereby certify that I have paid to William McAvoy the sum of $4,000 as payment for flight test of OS-2-U, under terms of contract No. 83142, this being paid by my check 4679, dated October 13, 1942. Edward F. Zap." [255]

"On the letterhead of Edward F. Zap, Aeronautical Engineers. October 11th, 1942. Los Angeles, California. E. F. Zap, Zap Corporation. I hereby acknowledge final payment in full covering my services in flight test on Navy OS-2-U airplane on Navy contract No. 83142. William H. McAvoy."

Q. By Mr. Binns: Mr. Byars, I show you this document on the letterhead of E. F. Zap, marked Exhibit 5 for identification—in evidence—and ask you was that document received by your office in the regular course of business in connection with the audit of the second page of the public voucher, which is the second page of Government's Exhibit 19 in evidence? A. It was.

Mr. Binns: May I read that to the jury, your Honor?

On the letterhead of E. F. Zap Aeronautical Engineers.

"October 6th. Received of Edward F. Zap the sum of $300 for excess time in time of flight

(Testimony of Hilton Jack Byars.)

test OS-2-U airplane at Daggett Field, October 6, 1942. William H. McAvoy, 3-15. Okeh. Zap."

Mr. Binns: I would like the record to show the jury is now examining the check No. 2679, check No. 2702, check No. 2794, all payable to E. F. Zap.

May I correct the record to show, your Honor, that the fifth page of Government's Exhibit 19, the number of the check is 2679?

The Court: Yes. [256]

Q. By Mr. Binns: Now, then, Mr. Byars, calling your attention to the first page of Government's Exhibit 19, the public voucher for cost plus contract number 32538, can you examine the books and records of E. F. Zap, and determine whether or not the United States Navy paid—~~made a~~ payment to Mr. E. F. Zap pursuant to that voucher?

A. In the Exhibit 38, page C-23, under date October 14, there is an entry to accounts receivable, U. S. Navy, 83142, voucher 39, $4,818.31. This page C-23 of Exhibit 38 is a record of cash received.

Q. And can you tell us what account posted in that cash received was charged to?

A. It was posted to account No. 6 of Exhibit 39, as a part of the total of $45,470.52. The pencil notation at the side of the detailed amounts making up that $45,000, among which is listed the $4,818.31.

Q. Can you tell us—drawing your attention to the third item appearing on public voucher number—which is the first document in Government's Exhibit No. 19—I strike that.

(Testimony of Hilton Jack Byars.)

Drawing your attention to public voucher—to the public voucher which is the first page of Exhibit 19, and to the item $1260, which is part—which is one of the items whose total is $4,818.31. Can you trace that item of 1260 for me on the books of E. F. Zap?

A. In Exhibit 38, page J-58, is an entry charged to [257] accounts payable, U. S. Navy, for $4,818.31, and a credit, Navy cost bill, contra, job 3-10, $835.41, and job 3-15, $3,982.90.

I trace the item of $1260 into Exhibit 38, on page CR-57, the next account in which it appears, check No. 2683, under date of September 25, check indicated as paid to E. F. Zap, $250. This item was posted to Exhibit 41, page 1, of Account 3-15. This check for $250, dated September 25, 1942, payable to E. F. Zap, No. 2683, marked Exhibit 37, is the check which supports the entry to which I have just referred.

Further tracing the $1260, in Exhibit 38, page CR-59, under date of October 13, check No. 2768, Edward F. Zap, $1010; that amount is posted to Exhibit 41, page 1, of Account 3-15, under date of October 13, E. F. Zap, $1010.

Q. I hand you two checks, Mr. Byars, the first of which is No. 2743, and the second of which is No. 2768, which has just been withdrawn from Exhibit 37 for identification, and ask they may be marked for identification at this time.

The Clerk: Marked as 37 for identification.

(Testimony of Hilton Jack Byars.)

Q. By Mr. Binns: I show you check 2768 in the amount of $1010, payable to Edward F. Zap, marked Government's Exhibit 37 for identification, and ask you is that the check which supports the entry you have just read? A. It does.

Mr. Binns: May the record show that check No. 2683, and check 2768 are now being passed to the jury? [258]

I offer these checks in evidence at this time, your Honor.

The Court: They will be received.

Mr. Lavine: We object as it is irrelevant, incompetent and immaterial, and not within the issues here.

The Court: Overruled.

Mr. Lavine: No proper foundation, your Honor. Exception.

Q. By Mr. Binns: Mr. Byars, I show you a check numbered 2743, dated October 10th, in the amount of $135, to the order of Harry H. Kern & Company, Ltd., marked Government's Exhibit 37 for identification, and ask you does that check appear upon [258-a] the books and records of Edward F. Zap?

A. It appears in Exhibit 38, page CR-59, under date of October 10, 1942, check 2743, Harry H. Kern Company, which is charged to accounts payable.

Will you please trace that check in the accounts payable?

A. The check itself does not show in the record

(Testimony of Hilton Jack Byars.)

of invoices, which is IR-11, of Exhibit 38. There is an entry under date of September 30th, Harry H. Kern & Company, Ltd., $135, which is credited to the accounts payable, and charged to the drawing account of E. F. Zap, $135.

Q. Will you please ascertain whether that entry of $135 was charged to the account of E. F. Zap?

A. In Exhibit 39, account No. 100, entitled drawing account, Edward F. Zap, under date of September 30th, with the posting reference, IR-11, is amount, $158.88, which is posted from Exhibit 38, which is the total of the column of the drawing account, Edward F. Zap, which includes the $135.

Mr. Binns: I ask, your Honor, that be admitted in evidence at this time.

The Court: It may be admitted.

(The documents attached to Exhibit 37 are here now admitted in evidence.)

The Witness: I am not acquainted with Harry H. Kern & Company, Ltd. They are in the insurance business. [259]

Q. By Mr. Binns: Mr. Byars, will you turn to the account No. 3-15 in the books and records of E. F. Zap? I would like to read the heading of this account into the record, your Honor.

The Court: Proceed.

Mr. Binns: "Page 1. 3-15, flight test."

Mr. Byars, I ask you now to examine that account and see if there are any other items therein charged which represent checks which have been made out to

(Testimony of Hilton Jack Byars.)

E. F. Zap, in addition to the five checks which you have just traced into that account?

Mr. Lavine: I object to that as irrelevant, incompetent and immaterial.

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: The account does not indicate any additional checks.

Q. By Mr. Binns: Calling your attention to the third document in Government's Exhibit 19, in evidence, was that document submitted to your office in the regular course of business for audit in connection with the public voucher which is the first document in this exhibit?

Mr. Lavine: Object to that as calling for a conclusion or opinion of this witness, no proper foundation laid.

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: It was. [260]

The third document in Government's Exhibit 19 in evidence was submitted to my office in the regular course of business for audit in connection with the public voucher which is the first document in this exhibit. [260-a]

Cross Examination

By Mr. Lavine:

As to becoming very friendly with Harry Champlin; we were business—we had business relation-

(Testimony of Hilton Jack Byars.)

ships. We were business friends, but not socially. Certainly, we went out to lunch together. I have no idea how frequently we went out to lunch together—occasionally. Probably nearly every time I went over there. I did not ask Mr. Zap some time in July, or suggest that I would like to become an auditor at his place of business. I am working as a civilian with the Navy; that is right. I did not suggest that a salary of $10,000 would be very enjoyable to me. I am familiar with Mr. Champlin's handwriting.

The contract 83142 was also split into two parts; certain items were fixed fee and certain items were cost-plus. Items 1 to 6 were fixed fee, and items 7, 8, 9 and 10 were cost plus.

Most of the claims that were made from the Zap concern were made to me; that is to say the first C.A.S. 4 forms came to me. And then if I approved of the item, then I sent back a C.A.S. form. And if I didn't approve of the item, then I sent a 5-A form back. I was constantly checking over these books. I was doing my work in accordance with the best of my ability. I was only permitting invoices to be approved in the event that I found that they were justified and correct for approval. I believed them to be. [261]

I approved the accounts, or I allowed them to be approved when the indications were that the charges were justified. All the items which I approved, the

(Testimony of Hilton Jack Byars.)

indications were, and they were believed to be correct. They were believed by me to be correct.

I testified on direct examination that out of the $5,200 of the bill of the University of Washington, that $1,909 had been paid, and to my knowledge, the balance of that money has never been paid to Mr. Zap by the Navy.

These particular books that I have been looking at and these various entries that I have read are all items of account in Mr. Zap's books. Those books on exhibit there, are not in the Navy books, they are Mr. Zap's books. And they are books that were kept by various persons in Mr. Zap's employment.

Q. By Mr. Lavine: Now you are familiar with the various handwritings on these books?

A. Not necessarily familiar with all of them.

Q. Well, in connection with the item of $1,108.78, will you look at that item and trace it in the books for me again, please?

A. Where do you want me to begin, Mr. Lavine?

Q. The first book that you looked at before. I would have interrupted you, but I couldn't interrupt Government counsel. Just look at the first place you found that $1,108.78. [262]

A. I don't recall where was the first one I saw, but I think it is in this book. I think here was the first entry, on Exhibit 38, page J 32, record of journal. The entry is dated May 31, 1942. It looks like it might be Harry Champlin's handwriting. Looking at the next place I'd find that item; that

(Testimony of Hilton Jack Byars.)

would be included in this total of $8,634.06, on account No. 6 of Exhibit 39. That might be either Cedric Browne's or Harry Champlin's handwriting.

The next place I see that item is on page C-19, of Exhibit 38, under date of June 11, in accounts receivable, U. S. Navy, there is an amount of $8,634.06, which is the same as the amount referred to under Exhibit 39, which included the $1,108.78. It seems to me that this is Cedric Browne's handwriting.

Q. By Mr. Lavine: Now let us look at the item No. 265 that you testified to. Do you recognize that? I think you first saw it in CR-43.

A. What do you mean, item 265?

Mr. Binns: If your Honor please, I would like to object. This is beyond the scope of the direct examination. There is no testimony whatsoever as to whose hand anything was written in on these books.

The Court: Sustain the objection of the Government.

Mr. Lavine: Exception. Now, in order that my record may be clear, I want to identify the handwritings of all of those exhibits that he has examined, as being those of [263] either Harry Champlin or Cedric Browne, your Honor, as showing our side of the case.

And we make that offer of proof at this time.

We offer to prove that each and all of these hand-

(Testimony of Hilton Jack Byars.)

writings which he has examined are either those of Harry Champlin or Cedric Browne.

Mr. Maury: Does the offer of proof include proof by the witness——

The Court: Both of these witnesses were on the stand, counsel had lengthy hours of cross examination, he had every opportunity to show who made the entries, and now he is asking a witness who was asked nothing about the handwriting in any of these exhibits to identify certain handwriting. The Government's objection is sustained. Exception allowed.

Mr. Lavine: All right, thank you, your Honor.

The Witness: In Exhibit 39, account No. 11, there is a column headed No. 50-0. In Exhibit 40, the page is not numbered, payroll period from October 8, 1942, to October 14, 1942, there is a column headed "Project No. 15, 50-0."

In connection with that project, I told the amount of time which that project showed, and the amount of money charged in that column is $283.79.

In connection with the amount of money for which the University of Washington billed Mr. E. F. Zap for $5,200 and some odd dollars, I do not know whether any amount is still owing by the Navy. Of such amount, however, it is not [264] to my knowledge that the Navy has paid the $3,365.

In connection with Exhibit 38, on page J-62, there is an entry dated October 31, 1942, charging work in process, job No. 50-0, with $283.79, under which it states "To transfer payroll to correct account."

(Testimony of Hilton Jack Byars.)

Concerning the item on Exhibit 41, page 2, of account 26-1, an entry under July 15, 1942, E. F. Zap wind tunnel expenses, $1,000, there is a record that the Navy paid that item? this would be included in the first request for withdrawal from the Navy control account.

There is another item for wind tunnel expense for $250, of which I have no recollection, but in looking at check No. 2683, of September 25, and CR-57, Exhibit 38, there is a check drawn to E. F. Zap in the amount of $250. The charge to that was for account 3-15.

Q. By Mr. Lavine: And fixed fee items are subject to re-audit by the Navy so that profits in excess of 7 per cent cannot be allowed to the contractor, isn't that right?

The Witness: The law is in a state of flux now. I would [264-a] rather not make a statement as to the matter of law. I don't know just what the provisions are on the re-negotiations now.

I am familiar with the items of accounting in connection with these Navy contracts. I am familiar with form TD-5000. I am not especially familiar with form IT-3400. I am acquainted with the fact that TD-5000 is incorporated in the contracts of Mr. Zap.

I joined the service as a Navy cost accountant, May 25, 1942. I took on the Zap job sometime in the first part of June, 1942. This was practically my first job as a Navy cost inspector. I familiarized

(Testimony of Hilton Jack Byars.)

myself with all the regulations and rules and directives before I took this job up. I couldn't repeat them verbatim. There might be some rules that would not be clear to me, yes, sir.

Q. By Mr. Balter: Isn't it a fact that you, as well as other cost inspectors, have had constant trouble over the itemization of fixed price and cost plus items?

Mr. Binns: I object to that, your Honor, as not within the issues in this case.

The Court: Sustained.

The Witness: Referring to Government's Exhibit 25, which is the University of Washington wind tunnel test made, and referring to the inspector's stamp, "Material Inspected and Accepted: L. V. Scott"; that would simply mean that as far as the inspector is concerned he has seen the wind tunnel [265] data and has inspected it; that would be my understanding.

I did not make any attempt to call the errors to the attention of Mr. Zap or Mr. Champlin or his auditors. I never did call it to the attention of anybody in the organization; to my knowledge, or to my recollection, I never did.

Redirect Examination

By Mr. Binns:

The Witness: In relation to Government's Exhibit No. 25, at the fourth page thereof, the notation "Material inspected and accepted; L. V. Scott"

(Testimony of Hilton Jack Byars.)

signifies that it had been received by E. F. Zap for the Navy, pursuant to work being done for the Navy.

I am not an engineer; I am not familiar in any measure with the data that is secured from a wind tunnel.

The notation which I have mentioned above, signed by L. V. Scott, would signify to the Cost Inspection Division that wind tunnel data had been received by E. F. Zap; and that that wind tunnel data was pursuant to a Navy contract.

When I testified that the Zap Corporation was my first job, I did not mean it was the first job I had ever had, but that it was the first job I had had for the Navy. Prior to going to work for the Navy, I had approximately eight years of experience as an accountant; four and a half years of it in my own office, and with other business concerns. I am not a certified public accountant. [266]

Recross Examination

By Mr. Balter:

The stamp "Materials inspected and accepted" means that they have been inspected and accepted by the Navy, but the acceptance by the Navy would not necessarily indicate physical segregation from something else that was being performed under the contract.

Q. By Mr. Lavine: Mr. Byars, didn't Mr. Zap

(Testimony of Hilton Jack Byars.)

ask you on occasions if everything was correct and satisfactory to you and the Navy?

The Witness: I don't recall any specific occasion. He may have.

Mr. Lavine: That is all. No further questions.

[266-a]

Los Angeles, California, Thursday, April 15, 1943.
9:00 A. M.

(The following proceedings were had outside the presence of the jury:)

The Court: Proceed, Mr. Lavine.

Mr. Lavine: Well, the first motion I have, your Honor, is a motion for the Government to elect which counts it will now proceed upon, upon each of these four phases of the indictment; and I can direct my motions subsequently to their election of the different counts, your Honor. We have a right now to have an election as to which counts they stand upon. We feel that there is a duplicity and repetition of the subject matter in the first three counts, and in the second group of counts, 4, 5 and 6; and counts 7, 8, 9, and counts 10, 11 and 12; that actually only one offense is charged; and that the Government, which indicated at one time that they may elect some time during the trial, should now make the election as to which counts they will rely upon in presenting those issues to the jury.

That is my first motion.

(Testimony of Hilton Jack Byars.)

The Court: All right, let the Government reply to that.

Mr. Maury: The Government is willing to make an election, your Honor, and asks that as to the defendant Zap counts 2 and 6 be dismissed; that as to both defendants counts 9 and 12 be dismissed; thus leaving the record in such condition that the Government relies upon an election [267] to proceed further under counts 1, 3, 4, and 5, as to Zap alone, and counts 7, 8, 10, 11 and 13 as to both defendants.

Mr. Lavine: Now, we then move, your Honor, in furtherance of this same motion, however, that counts 1 and 3 charge the identical claim; therefore, that the Government should be required to elect which one of those two counts they are going to stand upon; and that counts 4 and 5 are the identical claim involved, and that counts 7 and 8 are the identical claim involved, and that counts 10 and 11 are identical claim; and, therefore, that they should be required to elect which one of each of those groups of two counts that they will now proceed upon; that there being only one claim and that these are a duplication of the claim which is charged in the indictment.

The Court: You contend 1 and 3 are the same?

Mr. Lavine: Yes, your Honor. They involve the same identical claim.

The Court: All right. I will hear from the Government.

(Testimony of Hilton Jack Byars.)

Mr. Maury: The Government urges, your Honor, that accounts 1 and 3 are based on the same statute, constituting different crimes, and one is the presentation of a false claim for reimbursement for expenses; the first section of section 80, of title 18, of United States Code, Annotated. Second is a charge involving the same fact as count 3. I am addressing myself to count 3, pertaining to making false entries upon the books and records of Edward F. Zap: [268] such books and records of Edward F. Zap being matters within the jurisdiction of the United States Navy; that comes under the second concept of the statute involving, and the mere making of false entries in such books is, in itself, a crime; the distinction between the two facets, we might say, of the statute, runs through the indictment, and it runs throughout the case; it also runs through the statute, and, of course, it is elementary that one act might constitute a violation of more than one statute, or more than one portion of one statute; about that there can be no question; so, consequently, under the state of the record; we feel that there is ample evidence to go to the jury upon the counts indicated as different counts; namely, under the first group, 1 and 3; under the second group, 4 and 5; under the third group, 7 and 8; under the fourth group, 10 and 11.

Mr. Lavine: Now, the defendant Zap, your Honor, at this time moves for a directed verdict on

(Testimony of Hilton Jack Byars.)

each of the remaining counts left in the indictment.

(Argument)

Counts 4 and 5. Count 4 relates to the payment of a sum of $4,000, allegedly, and a purported claim for $4,000 to the United States when, as a matter of fact, there is a claim, not for $4,000, but a claim for $4,300, and the proof in connection with that particular item, as presented by the Government, the Government alleges in this particular account, or these particular accounts, that there was to be [269] that that was merely for flight tests; the Government exhibit, which was introduced in evidence, and which must be read most favorably to the party producing it, shows that that particular item was to be for flight test and insurance. That is the terms of the contract. In connection with that exhibit 49, the contract between the Government on a chief test pilot's fee and insurance, $4,000, and we submit that the Government's witness, Mr. McAvoy, testified that not only was all his insurance paid, all his expenses were paid, and the proof established that he got $200 more than was alleged in the indictment in the money itself. Therefore, the proof has failed as far as those two counts in the indictment are concerned.

The indictment, as your Honor knows, must be proved strictly as alleged, and here the proof is quite to the contrary of the indictment itself. The proof not only was that the item was not merely for flight test, but was for other items as well, and

(Testimony of Hilton Jack Byars.)

the proof as to the amounts of money received, and that other monies were paid, and that the amount of the claim was not $4,000 but was $4,300, and $4,300 was paid. That the Government's evidence further shows that the witness has testified there was no guilty knowledge on the part of Mr. Zap as to those transactions.

Motion for directed verdict on behalf of defendant Zap was made and denied and exception allowed on each count remaining. [270]

ETHEL H. BOYLE,

called as a witness by and on behalf of the defendant Edward F. Zap, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

I was bookkeeper at the Zap concern from September 8th until officially November 25th, 1942. There is an account in connection with the payment of certain items of fees for work done on contract 83142. Mr. Browne had me make out the account. I never at any time ever received any instructions from Mr. Zap on how to make out that account. I never did ever receive any instructions from Mr. Zap about how to make out any account. I did not ever see or hear Mr. Zap give me any instructions, to anyone in the office on how to make out an ac-

(Testimony of Ethel H. Boyle.)

count. I received my instructions from Mr. Browne in connection with the entering of the books and records in the firm.

Mr. Browne was the certified public accountant that I took my orders from him. Mr. Champlin was the comptroller and I took some orders from him, but those were the only two.

I don't recall ever seeing Mr. Zap look at any of the books and records. There was an item "Drawing Account," it was Mr. Zap's personal drawing account. I was there after Mr. Zap left for Washington. I saw what activity was going on in the office by Mr. Champlin and other employees. [271]

Any activities that went on in the private office, I was not there. I sat outside. Mr. Zap was arrested on November 5th, 1942.

Mr. Lavine: Now, state what Mr. Champlin did on that occasion, and on that date.

(Government objects, after argument.)

Mr. Lavine: What did Mr. Champlin do, particularly with reference to posting a sign or notice?

The Witness: Well, the first notice was to the effect that he was in charge. I don't know where that notice is now. I couldn't repeat its contents verbatim. It was something to the effect that he was in charge, but I really couldn't—I don't know—couldn't say.

Mr. Champlin called meetings. There were meetings all the time, but I—I really don't——

Mr. Lavine: What did you hear derogatory,

(Testimony of Ethel H. Boyle.)

particularly about any statements that you heard Mr. Champlin make against Mr. Zap? Just give us those statements.

Mr. Maury: No foundation laid, no time or place.

Mr. Lavine: What did you hear him say with reference to Mr. Zap? Against Mr. Zap?

The Court: Just be calm now. You are probably not used to this procedure.

The Witness: I am not.

The Court: Nothing to be afraid of, and just take your time to it. Don't hurry. Nothing to be nervous about. [272]

The Witness: Well, he would say that he was going to take——

Mr. Maury: Object to that.

The Witness: I really don't know.

The Court: You finish your sentence.

The Witness: He would say that he was going to take charge, and that Mr. Zap was going to be arrested. He told me that. (Witness became very nervous.) Goodness, I don't think I could repeat anything right now. My thoughts are just completely gone.

WALLACE HOWE McLAUCHLAN,

called as a witness by and on behalf of the defendant Edward F. Zap, having been first duly sworn, was examined and testified as follows:

(Testimony of Wallace Howe McLauchlan.)

Direct Examination

By Mr. Lavine:

I am employed at the Hughes Aircraft Company. I worked for Mr. E. F. Zap, Aeronautical Engineers from July '41 until about sometime in November, the 24th. I was aerodynamitist, and as aerodynamitist I made several trips to the University of Washington. I was accompanied by Mr. Zap, and also by some of the other men that were employed there on different occasions; didn't always have the same crew. I took different crews with me on different occasions. During 1942, I think we made three trips up there altogether. During those trips, [273] I had occasion to work in the wind tunnel at the University of Washington. I observed Mr. Zap working up there in the wind tunnel. He was always there when he was with us. He worked at night as well as daytime. We worked almost every night, and when we worked at night, we all had keys. We were given keys to the tunnel and to a private office which no one else could enter but ourselves on the day we were going into the tunnel. In other words, we signed the register and we were given those keys at that time.

When Mr. Zap was working in the evening, the number of students that he would have working with him varied greatly, on account of the difficulty of getting men. We sent word around amongst the boys in the classes that we would be glad to pay

(Testimony of Wallace Howe McLauchlan.)

them overtime for any time they could put in there between classes, or after classes, so they were coming and going and it is difficult to say just how many men were there, but sometimes we had quite a gang there, and sometimes there wouldn't be more than possibly eight or ten men, that might represent the regular crew, but it ran from eight to ten men, up to as high as—oh, I should say 15 or 20, or maybe on occasions even more, those that happened to come in. We would prepare for the work the next day. We were trying to hurry that job through so we could get the job through.

When we go into the tunnel we usually have a very definite purpose in mind: we are trying to find out the [274] answers to some particular problems, and we plan our progress in such a way as to get these results with the least amount of work and time, and the results of each day's work are very important in the planning of just what you shall do on the next day. In other words, you may find something out during the day's work which changes your plan entirely for the next day. So it is important to us to get the information from the day's work as quickly as possible. In the tunnel up there, normally, when you have a full crew, they would be able to give that to us. But due to the proximity of the Douglas plant—the Boeing plant up there—they took all the tunnel students just as soon as they were able to do this work, they would lead them off and pay them good money, so the

(Testimony of Wallace Howe McLauchlan.)

tunnel was really under-manned all the time, so we just had to do everything we could to get this work out.

Q. Yes. Did you have a name—call this work in the tunnel by any special name or title?

A. No. We just used and generally referred to it as—the tunnel charges are so segregated between the power charges, which are required to operate the tunnel, and your manpower charges, and I don't know as we had any particular designation for it outside of that.

Q. Did you call these students that you hire, did you call them "manpower"?

A. That would be the manpower part of it. Yes. Mr. [275] Zap paid these students privately. I saw him do that. These boys worked overtime for us, were always paid by Mr. Zap. He always carried the finances and they were all paid privately, usually in our little private room that we had for our own use there. He always paid them in cash.

We were asked to pay the boys personally, owing to the fact that Dr. Eastman objected to them working overtime on the grounds that it interfered with their grades, and also to the fact that they felt that when it was charged through the [275-a] tunnel they would not be paid the same rate that we were paying them.

The purpose in having these boys work overtime was to expedite the work in the tunnel. In other words, we were limited in the time that we could

(Testimony of Wallace Howe McLauchlan.)

get in the tunnel, so we wanted to get as much work done in that time as possible, and I believe it is generally conceded there in the tunnel we used to get about three times as much work out of the tunnel in our allotted time as any other of the manufacturers that came in there. Mr. Zap was always on the job and kept things going, and under pressure at all times.

Cross Examination

By Mr. Maury:

Mr. Zap knew he was paying these boys and he knew that Dr. Eastman objected to it.

Q. By Mr. Maury: Calling your attention to the contents of Exhibit S, stating the total cost of the test program, and outlining the charges that were made by the University of Washington, and the date done, now, can you tell us concerning Report No. 177, what work was done at the University of Washington wind tunnel?

The Witness: On report 177 the tunnel work involved the determination of dynamic characteristics, uses of lift, and drag, and moment coefficients.

Q. By Mr. Maury: What job was it on?

The Witness: That is 177. This 177 was called special [276] wing, which was designed to bring out certain pertinent information.

Q. By Mr. Maury: Was it called Project 15 at Mr. Zap's plant?

(Testimony of Wallace Howe McLaughlan.)

The Witness: 177 and 178 were called Project 15.

(Whereupon, at 12:00 o'clock noon a recess was taken until 2:00 o'clock p. m. of the same day.)

[277]

Los Angeles, California, Thursday, April 15, 1943.

2:00 P. M.

Wallace McLaughlan

resumed the stand as a witness on behalf of the defendant, having been previously duly sworn, and testified further as follows:

Direct Examination
(Continued)

By Mr. Lavine: You were asked about Project 15 just before the noon recess. Tell us what is project 15?

The Witness: Project 15 was the file number given to two guinea pig wings which we developed to bring out certain specific information which was necessary in the application of our flaps to the different designs that were contemplated. I don't know who gave the project that number or that designation. As to how that came about, I think probably some clerk or something put that number on there. I know when I finished the report it was bound up and when I received a bound copy it had "Project 15" on the outside, but I didn't pay much

(Testimony of Wallace Howe McLauchlan.)

attention to the filing system. I didn't know what the numbers meant.

Project 15 covered two wings which were designed with the specific purpose of securing some general design information which we needed and needed badly, to determine design loads for applying the Zap flap and aileron to the project that we were actually working on with the Navy. [278]

When I went to work for Mr. Zap the first thing that he started me on was preparation of a design manual which, I understand, the Navy had requested, for the use of manufacturers in general who wished to apply the Zap devices to their airplanes, and he told me that we had all the information that was necessary to proceed with this manual. When I got into it I found out that there were many, many points that we were very weak on and needed more general information, and so I started harping on plans to get this information, and every opportunity we'd try to get a little more information of a general nature.

So these two wings were designed with that specific purpose in mind, of finding the effect of the Zap flap on wings of different spans and different thicknesses, and they were purely and simply what we called guinea pigs.

Q. Now, Mr. McLauchlan, was this experimental data of value, in your opinion, to the United States Navy?

Mr. Maury: Objected to as calling for a conclusion of the witness.

(Testimony of Wallace Howe McLauchlan.)

Mr. Lavine: He is an expert. He is qualified as an expert.

(Question reframed) By Mr. Lavine: Mr. McLaughlan, are you familiar with the projects on which Mr. Zap was working under contract with the United States Navy? A. Yes, sir.

Q. Now, did this experimental work help beneficially [279] in those particular matters in which Mr. Zap was under contract with the United States Navy?

A. That was the purpose for which it was done. It was absolutely essential.

Q. By Mr. Maury: Now, you stated that report No. 177 and 178 related to this project 15. Was there other work done at the wind tunnel besides on these two reports? A. Yes, there was.

Mr. Maury: We will stipulate that there was.

Mr. Lavine: Well, I thought the effect of your question was that there wasn't. I will accept the stipulation.

Cross Examination

By Mr. Maury:

Q. Mr. McLaughlan, do you know of your own knowledge whether or not this project 15 was one of Mr. Zap's own experiments, as distinguished from his Navy contract?

A. The question is rather broad.

Mr. Lavine: Now, just a minute. I object to that as calling for an opinion and conclusion, because we expect to show that under the terms of

(Testimony of Wallace Howe McLauchlan.)

contract 83142 and 4105 and TD 5000, which is a provision of those contracts, that Mr. Zap had a right to conduct any and all experimental work, even in advance of contracts; that that was contained right in those contracts. So this is calling for a conclusion of the witness.

The Court: I will permit the question. [280]

Mr. Lavine: Exception.

The Witness: This work, the two wings, was done at my own instigation. I am talking about project 15—those two wings. That was done because the stress department lacked sufficient information to properly design the Government jobs which we were designing at that time, under contract. We needed further information. So these wings were designed to bring out certain information which we felt was essential to the completion of these contracts. In that sense I would say they were not a private venture.

We were working on the OS2U. I don't know the numbers of the contracts. That was the Vought-Sikorski. And the Grumman contract was especially the one that we needed this information, because the Vought job had progressed to the point where we couldn't do very much about it, but we felt that it was—we hdad done a lot of guessing on it as far as certain design loads and so forth were concerned, which we didn't want to have to do on the Grumman.

This work took place on project 15 that we did at the wind tunnel; it was on the trip up there in

(Testimony of Wallace Howe McLauchlan.)

the latter part of February, 1942. I think that contract, that tunnel date was for about seven or eight days. We tested the 177 and 178. Those were the two guinea pig wings. We also had the Grumman model along with us. We put that in the tunnel and checked that to get certain calibrating checks which were necessary to tie this work with the Grumman job. Separate reports were [281] made for the Grumman job. I remember testifying before the Grand Jury.

Q. Do you remember Mr. Harrington asking you concerning Project 15? Was that one of——

Mr. Lavine: I object to that as an improper method of impeachment of the witness.

Mr. Maury: Not for impeachment purposes. This is to refresh his memory, your Honor. I am asking him if he remembers.

Mr. Lavine: I submit it is not proper foundation.

The Court: Show it to him then. He has a right to see it.

Mr. Lavine: I have a right to see it.

Mr. Maury: No, sir. Neither has a right to see it in the Federal Court. This is a Grand Jury transcript, your Honor.

Mr. Lavine: He has got to show it to him, to the witness, and he has got to show it to me, your Honor. If there is any question about that—I think your Honor is quite familiar with the rule.

(Testimony of Wallace Howe McLauchlan.)

Mr. Maury: I think that question was decided both in the General Motors case and the Socony Vacuum case, your Honor, that it was not necessary in such procedure.

The Court: You say it is not for the purpose of impeachment?

Mr. Maury: No, sir, for the purpose of refreshing the [282] *the* witness' memory.

Mr. Lavine: There is only one rule for refreshing a witness' recollection, your Honor. It has got to be shown to the witness.

Mr. Maury: Not in Federal courts, sir.

Mr. Lavine: In any court.

Mr. Maury: Not when it is a Grand Jury transcript.

Mr. Lavine: I will submit it.

Counsel certainly has a right to ask him. Suppose in the next sentence he amplified and clarified it. Am I limited to the one sentence that he is asking this man about?

The Court: No, but if the witness' attention is once called to a certain incident, why, then he can certainly go ahead right there and from there on explain anything he wants to about it.

Mr. Lavine: First of all, your Honor, the rule is that in order to refresh a witness' recollection the document must be shown, and he must be asked if that refreshes his recollection. If he answers no, that it doesn't, that is the end of the proceeding. If the answer is yes, it does, then he can proceed.

(Testimony of Wallace Howe McLauchlan.)

The Court: I will overrule the objection. Proceed.

Mr. Lavine: Exception noted.

Q. By Mr. Maury: Mr. McLauchlan, do you remember——

Mr. Lavine: Pardon me just a minute. May I at this time request the Court for permission to see the document [283] which is now attempted to be used to refresh the recollection of this witness?

The Court: It is not offered for impeachment and, therefore, it will be denied.

Mr. Lavine: Exception noted.

The Witness (Continues): I remember testifying before the Grand Jury. I don't remember Mr. Harrington asking the particular question, what was project 15.

Q. Do you remember answering him in the following words: It was a——

Mr. Lavine: Now, to all this we object, your Honor, as an improper method of refreshing his recollection, and we submit that it has not been shown to counsel and that it is not proper form of procedure.

The Court: Overruled. Proceed.

Mr. Lavine: Exception.

Q. By Mr. Maury: Do you remember answering in the following words: "It was a cargo carrying ship which we were working on at that time"?

A. I don't remember the exact phraseology. I might have said that.

(Testimony of Wallace Howe McLauchlan.)

Q. Do you remember Mr. Harrington asking you: "Was that one of Zap's own experiments, as distinguished from his Navy contracts?".

Mr. Lavine: Just a minute. Same objection, your Honor.

The Court: Same ruling. [284]

Mr. Lavine: Exception.

The Witness: That was one of the questions, you say?

Q. By Mr. Maury: That is what I am asking you, whether you remember it.

A. I remember it was discussed. I don't remember the exact phraseology that was used.

Q. Do you remember answering that question in the following words: "As I understood it was"?

Mr. Lavine: I object to that as irrelevant, incompetent and immaterial, what his understanding was. He didn't say he knew. And I object to it as an improper form of refreshing his recollection.

The Court: Overruled.

Mr. Lavine: Exception.

Mr. Maury: Will you answer the question, please?

The Witness: I don't remember answering the question in those words, although it might have been.

Mr. Maury: That is all. One thing further, please.

Mr. Lavine: Now, the defense counsel——

Mr. Maury: One moment, please.

(Testimony of Wallace Howe McLauchlan.)

Mr. Lavine: Yes.

The Witness: I remember compiling a sort of a report concerning this project 15. There was a small booklet made of it. It did not have a good deal of this data from the wind tunnel in it. It did not have any data which was based on that. This booklet was compiled before those tests were [285] made.

The Court: The testimony is in. I have permitted it to stand, counsel. He said the book was made prior to the tests, and I permitted it to stand.

Q. By Mr. Maury: What was the book?

A. The book was a proposal showing an estimated performance of a cargo carrying plane which we hoped to design around the Zap high-lift devices. The book was submitted to the Navy and to the Army, by Mr. Zap, for the purpose of calling their attention to the possibilities of such a type of plane which we felt was very greatly needed at that time.

There's no particular limit to the size the plane might be. The particular one we had in mind was, I think, something like 100,000 pounds. Well, the wing spread—you could vary it. We had shown a wing spread of 150 feet, I believe, on that particular model. I couldn't say what was the length. That is not a dimension that we're especially concerned with in our design. The length of the plane is not a major dimension. If you speak of the size of a building you might give its width and height.

(Testimony of Wallace Howe McLauchlan.)

and length, but you wouldn't say how high this door was or that door was, if you are just speaking of the building in general terms. I have stated that I do not know the length of the plane. The wing span was 150 feet. I couldn't tell you what would be the height of the plane. I do not know what the wing spread of a Vought-Sikorski was. I did very little work on the [286] Vought-Sikorski. I did quite a bit on Grumman NX 4105 at different periods along through my employment there. The Vought-Sikorski is not a cargo plane. It is a scout observation. The Grumman was a fighter.

GEORGE JUE,

called as a witness by and on behalf of the defendant Zap, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

I am employed at the Howard Hughes Aircraft Company. I am a graduate of the Massachusetts Institute of Technology. I used to work for Edward F. Zap in June, 1941. I was employed there for about 18 months. I went to the University of Washington, making wind tunnel tests there. I went up twice in 1942. During the time that I went up there, I did see Mr. Zap there. At that time I conducted wind tunnel tests in the University of

(Testimony of George Jue.)

Washington—we did. I was working on the wind tunnel in the daytime and also in the night.

I worked every night. Usually we quit at 11:00 or 12:00, but sometimes we worked on until 1:00 or 2:00 in the morning. During that time, Mr. Zap had students of the University of Washington working with him. It varied at different times, from 15 to 30, I would say. I saw how those students were paid. Mr. Zap paid them from his pocket, in cash. I didn't [287] see any receipts given by the students. I am familiar with the rules of the University as to these students working at night. I think they were not allowed by the University to work at night. When we worked that way at night, we would be all prepared for the next day's work in the wind tunnel.

In connection with that work, I am familiar with the terms and titles that are used in our business. We have a language of our own, so to speak, about some of the things we do. We call the working in the wind tunnel as to the different men who were employed there, we call it "manpower".

We had keys of our own to the wind tunnel. We had access to running the tunnel at night. We got special permission to run it late in the evening. Mr. Zap worked longer than most of all the fellows and he usually stayed through to see that everything was brought together right, in the night.

(Testimony of George Jue.)

Redirect Examination

By Mr. Lavine:

Q. You didn't give your degree in the University.

It is stipulated that he has a Master's degree from the Massachusetts Institute of Technology.

(Witness excused) [288]

DAVID KEHSIN WANG,

called as a witness by and on behalf of the defendant Zap, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

I am a graduate of Massachusetts Institute of Technology. I went to work for Mr. Zap January 7, 1942. I am now working at Howard Hughes Aircraft Company. I worked for Mr. Zap for approximately 10 or 11 months, until it closed up. I stayed on after that time. I remember going to the University of Washington on some wind tunnel tests. I think the tunnel date was February 24th, until about March 4th. We went a couple of days before that. I met Mr. Zap up there. We worked late into the evenings. We had keys there to go in and come out. Mr. Zap was employing a number of students there—I would say about altogether 25 or so. He paid them—he just gave the money to them; in

(Testimony of David Kehsin Wang.)

cash, that. is. That work enabled him to be prepared for the next day's runs. We usually tried to get things, the model fixed up so we could start first thing in the morning again before we'd leave. We did use the tunnel balances. I remember specifically. I don't recall about whether the tunnel was run. Usually, I went home around, oh, 10:00 or 11:00, and I know Mr. Zap stayed later than that.

[289]

ETHEL H. BOYLE,

called as a witness by and on behalf of the defendant Zap, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Lavine:

Q. Miss Boyle, I hope you don't get too nervous now. A. I will try not to.

Mr. Byars called me up on the telephone during the month of September or October of 1942 and dictated it to me over the telephone. He called me in reference to making out an invoice. He dictated the form of the invoice and how much I—the figure.

Q. One other thing, Miss Doyle. This morning I asked you some matters with reference to Mr. Champlin. I will ask you if Mr. Champlin told you after Mr. Zap left that he was going to send him to prison for 167 years, or words to that effect?

The Witness: He did.

(Testimony of Ethel H. Boyle.)

Q. And did he tell you on that occasion that he was going to be in charge of Zap's concern and that you were going to have to take orders from him?

The Witness: He did.

Cross Examination

By Mr. Maury:

Mr. Browne and Mr. Champlin gave me my orders there. [290] As for receiving orders from anyone else, it's just the thing that Mr. Lavine asked me; Mr. Byars called me and I did take an invoice, two invoices, I believe, over the telephone. I never gave a check to Mr. Zap directly. I used to give my checks to Mr. Browne and he took them in to Mr. Zap. I gave Mr. Zap a check in blank through Mr. Browne, yes. I never had any dealings with Mr. Zap directly.

I remember a conversation I had with you over the telephone about a week ago last Saturday, and I told you at that time I was very hazy and I was going to try and think about it, and I called Mr. Browne and asked him, so I would be sure and give the right testimony when I came to court, because I didn't want to do anything wrong. Surely, I checked it up then.

Q. By Mr. Maury: At that time it was your recollection, was it not, that the only blank check you had ever given Mr. Zap was the one that was later returned and filled in for $4,000, isn't that right?

A. Yes, I took notes as you were also taking notes of my conversation. And I called Mr. Browne

(Testimony of Ethel H. Boyle.)

on Sunday and asked him to be sure that I would have the right information because I told you I was rather hazy about it, and I took my notes, too.

Q. Then it was Mr. Browne who gave you the directions or orders to fill in that check for $4,000?

A. Yes, it was. [291]

Q. By Mr. Maury: Calling your attention to Government's Exhibit 7, in evidence, this is the check, is it not, Miss Boyle? A. Yes, it is.

Q. And when it left your possession it was in blank?

A. It was given to Mr. Browne. All checks were placed in Mr. Browne's desk, and he took them in to Mr. Zap.

Q. I see. When it came back what happened?

A. Mr. Browne was given it again, and then it was given to me and I deposited it in the bank.

Q. I see. Do you remember whether it had that endorsement on it at the time you saw it the second time when it came back?

A. It had Mr. McAvoy's endorsement, and it had Mr. Zap's signature.

Redirect Examination

By Mr. Lavine:

Q. As I understand your former testimony the amount was still blank when it came back to you?

A. When it came back to me to be filled out, yes, sir.

Q. And you took directions how to fill that out from Mr. Browne? A. From Mr. Browne.

(Witness excused) [292]

EDWARD F. ZAP.

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

I have been an aeronautical engineer between 28—close to 30 years. I started off with Chrysler, as I recall it, in 1923. Before that I was more or less independent. With Chrysler I was more or less chief of research, in the automotive branch, and later on we started aviation—that was around the *Lindburgh* boom, when *Lindburgh* flew the Atlantic. I continued in that research work—roughly—of course, I can't say the date correctly, but somewhere around 1933—1932 or '33.

During the time that I was working with Chrysler, I commenced work for the United States Navy. One of the duties of mine was to check up on the Fokker Aireraft, in Hasbrouch Heights, for Chrysler. It was contemplated, or Mr. Fokker made the offer to Chrysler to take that corporation over and make it a Chrysler division, so I was sent to Hasbrouch Heights to investigate the situation and make a report and see what can be done. I later became consulting engineer in aviation for other companies.

That Fokker situation broke up at Chrysler, and it was taken over by General Motors, and I joined the Fokker Corporation for a short period. I can't recollect. I think it [293] was somewhere around

(Testimony of Edward F. Zap.)

1925. That Fokker Corporation was the beginning of General Aviation, which now is North American Aviation. And Mr. Kindelberger was then and there the head of the corporation back in the east.

I was consulting engineer almost to any major aircraft company in the *company*. There is Boeing. Boeing is using my flap on their Flying Fortress. I conducted a lot of wind tunnel tests for them, down at N.A.C.A.; that is the National Advisory Committee for Aeronautics. The Martin Company, Lockheed, Vultee, Douglas Aircraft, Douglas Aircraft Division, El Segundo, Fairchild, Welt, there probably are four or five little companies I did some consulting work for and got paid for, and probably there are a flock of corporations which went under in the meantime.

The old Zap flap which is known all over the world as the split flap, I originated that flap. That was done somewhere around 1928 or '29. We did a lot of wind tunnel testing before that. Then we finally built an airplane to discover or to get the proof of the pudding in flying an airplane, and I traveled all over the country and demonstrated that flap for Army and Navy officials, and at that time I was turned down. I was literally thrown out on my ear at the Army with it, and just about two years later it was generally adopted on every airplane, and this was probably in the period from 1928 until 1934, it was used on almost every airplane in the world, and is still used. Of course, there are other [294] flaps used now, too.

(Testimony of Edward F. Zap.)

The new flap is more or less a further advance from the old flap. The old flap is more or less a landing flap, as we call it in our profession, whereas the new flap is for the sole purpose to help the take-off. The new flap changes the airfoil section from a high speed section to a good climb section, and that is the main purpose of that flap. It works on a very simple basic aerodynamic principle; that is, on the two basic laws of aerodynamic area extension and camber increase. I don't want to go in too much of technical things, but I can explain it very simply in common words. I usually explain it to students by taking a spoon, a common kitchen spoon, and going to the faucet in a kitchen, turning on the faucet full stream. If you take the spoon into the stream the spoon is sucked in; if you reverse the spoon and try to push it into the stream, the stream pushed the spoon out. That is the simplest explanation why an airplane flies. You can try that tonight at home.

In the first place we were after to increase the takeoff; that means area extension plus camber increase. Then we found, of course, we needed also some help in the landing. It was a simple matter to roll that flap steeper out on a particular radius.

I could explain this thing, your Honor, if I could use the blackboard.

(Going to blackboard) [295]

This is a common wing section (indicating). Now the new flap is nothing else but an extension of the

(Testimony of Edward F. Zap.)

upper surface. It rolls out in a curve on a radius. The purpose is to extend area, at the same time to increase the camber. What this thing does, aerodynamically speaking, as I tried to explain with the spoon—I will sketch this up. We have a kind of a stream coming out of the faucet here. You put that spoon in this way and you will find it is sucked into that stream very vigorously. If you put that spoon in reverse it is blown out. That is the proof why an airplane flies. You just have to turn that stream to 90 degrees. The air passes over the wing, sucks that wing into the stream. It does not make any difference if the stream is standing still and the foil is moving, or the foil is standing still and the stream goes.

You can light a match by striking a pad, or you can hold a match still and move the pad over it. It is the same effect. This is the same effect; in the wind tunnel we keep the model, the airplane still, but move the stream. In actual flying conditions the airplane moves and the stream is standing still.

Now, to make the story short, extending these things out with the flap—I will sketch it up plainly here—there is a pressure differential created going through the air which is, in our language, expressed by a curve. This is more or less a partial vacuum curve which supports the airfoil, and [296] there is a slight little pressure thing created which also supports the airplane. Both areas represent the weight of the airplane.

Now, naturally, if I extend that area out here,

(Testimony of Edward F. Zap.)

automatically this curve is extended. At the same time from the bottom side we obtain a little pressure curve extension. These two area gains is to gain in lift. So by simply taking an airfoil section and rolling that new flap out, I am able to double the lift on that wing section, and this is done by extending only 20 per cent of the original surface. In other words, the gadget on the tail stimulates the front part of the wing to such an extent that it creates twice as much lift. And that lift can be utilized now in many ways; either carrying double the load, or, with the same load, the takeoff is in a shorter distance. This is just plain logic. If you have a wing going through the air with the same weight and the wing creates twice as much lift, naturally it takes off in a shorter distance; or you load that airplane up twice as much and then it runs over the same distance and takes twice as much load off.

The same thing applies when the airplane goes up in the air. We call it the ceiling, which is the top, the air gets rarefied, the airplane can't make it any more; if we roll that device out, naturally the airplane can climb to a higher altitude.

Probably that is enough. [297]

When I took up this work with the Navy on this new flap, I believe it was somewhere around 1934 or '35. Without looking the records up I couldn't say. Of course, I had been known in the Bureau years ahead of that time. I worked for the Bureau right from the beginning, when I was connected

(Testimony of Edward F. Zap.)

with the Fokker Corporation, General Aviation. That was back in 1927, '28. I demonstrated an airplane. I flew down to Anacosta in those days for the first time in the world with a flap on an airplane. I conducted wind tunnel tests then for the United States Navy, and in the Navy testing grounds at Anacosta.

I flew that airplane down to Anacosta and demonstrated the airplane down there, and Navy pilots took it up then afterwards, and the Navy decided to send this airplane down to the N.A.C.A., which is the National Advisory Committee for Aeronautics, the leading research laboratory in the world, and that airplane was put in the full scale tunnel to get coefficients and engineering data for general use for design purposes to the various contractors, and there is a report and this is existing in the libraries; you will find them in our libraries all over the world, the N.A.C.A. report about the first split flap, and the research.

I started to take up my flap about 1935 or '36 in the Bureau of Aeronautics in Washington. There was a depression on in those years, and I went to the Bureau—no. I think I got a letter from the Bureau to come down and look at some [298] reports, or some kind of a problem. I could dig up the informatin in my files. I was invited to come down to the Bureau, and the purpose I have forgotten right now. Out of that visit there came—of course, I knew all the commanders and captains in the Bureau, and they asked me what I have done in addi-

(Testimony of Edward F. Zap.)

tion to that flap, or if it could be improved. Well, it is a long story. To make it short, the question of the Bureau was this. The equipment of Naval aircraft is getting heavier and heavier; the wind loading, which is another technical term I want to dispose of quickly. As we call it, wing loading means the loading a square foot of wing. The higher the loading is, the more cumbersome the airplane gets so far as takeoff and maneuverability is concerned. In simple terms, if you take your own car and load six people in there and drive around a curve, you know what it does; it leans over and is hard to handle. If you have two persons in there you slip around the corner much easier. The same thing is the wing loading.

The Naval equipment got heavier and heavier. Wing loading used to be originally on airplanes starting off at six pounds per square foot. Today we are up to 40, 50 and 60 pounds wing loading. At that time the wing loading was creeping up to 15 or 20 pounds, and the Navy had extreme difficulties of catapulting the airplanes from the cruisers, and takeoff on restricted places.

So the chief discussion was how to help an airplane [299] takeoff, shorten the takeoff distance. And I explained that naturally there must be some means, and I spent a lot of thought to improve that old flap of mine for takeoff, and the outcome, to make the story short, was that they invited me to do some more research or make suggestions on how

(Testimony of Edward F. Zap.)

such a thing could be done. I don't recollect all the details or how it happened. I know this. The Navy gave me two wind tunnels in Washington, D. C., the Navy tunnels, at my disposal to start that research. I don't know in detail. I guess I had to make the models and run engineering on them, and they gave me the equipment to test this thing. There are two thick reports in my file, and the Navy file, confidential file. To make the story short again, I think I did that about two years.

After that time, I got a contract with the Navy for the doing of experimental work. In the wind tunnel we proved the claims we made for that flap. Then it reached the stage where the Bureau said, "Yes, this is correct; it can be done." Now, in Navy terms they said, "We want to build it in an airplane and sit on it and see if the other end feels the same way with it." Then I got an experimental contract to put that particular new flap on an airplane and fly with it. That was somewhere around—without looking at the records I can't say. 1937, '38, somewhere around that time.

That is the Bureau of Aeronautics, which is a branch of the service in the Navy which takes care of aircraft [300] and aircraft equipment to the Navy, and it consists of a stress department, aerodynamic department, engineering department, purchasing department, and—oh, gosh. Now—my best sponsor there used to be Admiral Moffett. I forgot to tell. You see, Admiral Moffett died on a dirigible

(Testimony of Edward F. Zap.)

in a crash. He used to be chief of the Bureau of Aeronautics.

After that I took up these matters with the Aeronautics section. The section head is Captain Walter S. Diehl. Then the Engineering section. There are several captains and commanders. You see, they are changing every two or three years, another naval officer comes in and takes charge and the particular naval officer goes back out to the fleet or to some other branch of the service. In the Engineering section is Captain Penoy, Captain Stevens, Captain Ostrander. There used to be Captain Pace. He is Admiral Pace now.

Then the project officers on the job are Commander Flemming, Commander Pearson. Those are called project officers, which are in charge of the various types of airplanes. You see a fighting airplane is called an F4 or F45; it is a fighter. OS-2-U means observation scout. SO means scout observation. B means Bomber, and so on down the line. And for such different type of airplane there is a so-called project officer who knows all the details, the specifications, and what is necessary in that airplane, what the Navy wants, and so on down the line of a thousand technical details of making an airplane. [301]

All my contracts except the last two were fixed price contracts. In other words, I agreed to do the work for a certain amount and was to get paid a certain amount. That is correct. The last two were

(Testimony of Edward F. Zap.)

mixed contracts, as we call it; cost plus a fixed fee, and fixed price for certain items. Mostly the engineering items were fixed and the physical parts, building the airplane, were cost plus. I had a total of approximately seven or eight. I got a new contract as late as September, 1942. A little work had been done on that contract. Usually in the last year or two years we started ahead of time. Particularly since Pearl Harbor everything was in a hurry. Go to it and you get reimbursed after the contract is signed.

I entered the contracts and there were several in number and, as brought out more specifically in the contract itself, each was a continuation of the other, more or less. I did some work on some of those contracts in advance of getting any actual contract from the Government in writing. We always got it earlier. I usually made a periodic trip to Washington. It is all in the records, in the files. It was about three to four times a year I went to Washington; every three months. I usually made a round in all the offices in the Bureau, visited whoever was there and I could get hold of and I thought it was important to talk to, and straighten matters out which we couldn't straighten out by letters.

I know Mr. H. E. Talbott. I was connected with him in [302] the Chrysler corporation. He is a director of Chrysler. I think he was at one time chairman of the Board of the Chrysler Corpora-

(Testimony of Edward F. Zap.)

tion. Later he became the director of aircraft production under Donald Nelson. He is his right-hand man for aircraft production.

We had two bosses; one is the Navy, the other is Talbot, you see. He was director of Aircraft Production. If there were any civil matters to take up, we had to take it up with Mr. Talbot.

Mr. Talbot was out here and looked matters over, and he induced me to build a plant, and he wants to go in it, and he wants to run the financial end of it, and I should concentrate only on the engineering end, and on the research end.

I met Lieutenant Commander Scott at Northrop Aircraft. At that time he was a civilian. I don't know correctly what his status was with the Navy. He was just an inspector, a Naval inspector which walked in my office and checked an airplane or material. To my recollection he didn't have any title whatsoever, just "Naval Inspector", and he had the standard Navy button, like any other inspector.

Mr. Talbot's idea was at that time to go in financing the plant, starting in somewhere around $500,000, and build the thing up to $5,000,000.

What stopped the plan from being carried out was more or less, well, the war condition throughout the world. [303] We were put in an emergency thing. And that was just about a year or a few months before Pearl Harbor, and, well, without thinking it over I don't know the real reason. The real reason, as it appears to me, was Mr. Talbott

(Testimony of Edward F. Zap.)

didn't know what's going to happen. And we carried on the negotiations for about a half an hour, and the question was to have a production manager to take care of building the airplane, standing up for the shop, and so forth. And Mr. Scott was around and at that time I knew him. After several months negotiations with Mr. Talbott I knew him a little more, and I got a good recommendation from the Bureau, who he is and where he came from and how long he was in the Navy, and he appeared to me like a good production that really knows shop procedures and carrying on, and handling men, which I did not know. So Mr. Talbott looked him over, or one of his righthand men, and said, "That is the kind of man you need in the shop to carry on, Zap. You are just a research engineer and you are not the man to handle 500 or a thousand men. You need a two-fisted man to go after it."

I took the matter up with the Bureau as to whether they would release Commander Scott, because the next thought in my mind was, well, here is a Navy inspector who actually had nothing to do with me, just inspecting the material or airplanes, but just the same, my good relationship with the Bureau—I didn't want to do anything without approval of the Bureau. [304]

Mr. Lavine: I would like to show that there is a provision in this contract that I think counsel will stipulate to, that there is a provision referred to as "PD-5000."

(Testimony of Edward F. Zap.)

The Court: That is right.

Mr. Lavine: And I would like to read a provision of that "TD-5000," so the jury will understand it, as it relates to experimental work. I am sorry, my copy and Mr. Balter's copy of the same work, got mixed up, and I had mine marked. I would like to read "TD-5000, Section D."

Mr. Maury: What work is that, Mr. Lavine?

Mr. Lavine: "Government contract procedure and accounting."

Mr. Maury: Who is it published by?

Mr. Lavine: Prentice-Hall, Inc.

Mr. Maury: I have no objection to its being read from that book. That is an accredited authority.

Mr. Lavine: (Reading):

"Other manufacturing cost. Other manufacturing cost as used in paragraph (b) of this section includes items of manufacturing costs which are not properly or satisfactorily chargeable to factory costs (see paragraph (c) of this section), but which upon a complete showing of all pertinent facts are properly to be included as a cost of performing the contract or sub-contract as, for instance, payments of royalties and amortization of the cost of designs purchased and [305] patent rights over their useful life; and 'deferred' or 'unliquidated' experimental and development charges. For example, in case experimental and development costs have been properly deferred or capital-

(Testimony of Edward F. Zap.)

ized and/or amortized in accordance with a reasonably consistent plan, a proper portion of the current charge, determined by a ratable allocation which is reasonable in consideration of the pertinent facts, may be treated as a cost of performing the contract or sub-contract. In the case of general experimental and development expenses which may be charged off currently, a reasonable portion thereof may be allocated to the cost of performing the contract or sub-contract. If a special experimental or development project is carried on in pursuance of a contract, or in anticipation of a contract which is later entered into, and the expense is not treated as a part of general experimental and development expenses or is not otherwise allowed as a cost of performing the contract, there clearly appearing no reasonable prospect of an additional contract for the type of article involved, the entire cost of such project may be allowed as a part of the cost of performing the contract."

The Witness: I came up to 1942 and '43, and in the meantime, I had engaged in considerable correspondence with the Bureau of Aeronautics at times, from time to time, and some of that correspondence went into forms of contracts, [306] or additions to contracts I had.

Q. By Mr. Lavine: Prior to your opening your own plant did you carry out some of the terms of

(Testimony of Edward F. Zap.)

the projects in connection with contracts 83142 and 4105 through sub-contractors and other persons?

The Witness: Yes, the sub-contractors.

The Court: March 22, 1941, was the date that contract was entered into, 83142.

Q. By Mr. Lavine: In reference to that contract did you do some of the work at some of the other airplane factories, referring specifically now, did you do any work at Northrop?

The Witness: I did.

I am acquainted with Captain L. C. Stevens, who was then Commander Stevens. I got a letter in connection with my contracts from Captain Stevens.

The Clerk: Defendant's Exhibit KK.

(The document referred to was received in evidence and marked DEFENDANT'S EXHIBIT KK.)

Mr. Lavine: (Reading)

"Navy Department
Bureau of Aeronautics
Washington

February 11, 1942.

My Dear Zap: [307]

"Receipt of your letter of February 7, 1942, is acknowledged. You know, I have long believed that it is necessary that whatever setup you work out be based on the undertaking of production work, either directly or as sub-contracting, in order that you may be in a strong enough economic position to continue to engage

(Testimony of Edward F. Zap.)

in experimental work. I am very pleased to note from your letter that you seem to have reached the same conclusion.

"I wish you every success in your proposed arrangements, and I am calling the attention of our Procurement branch and Production Division to your letter. I should think that sub-contracting would be your best solution for the immediate future.

With kind regards, I remain very truly yours,

L. C. STEVENS,
Commander, USN.

Mr. E. F. Zap, 10976 Wilshire Boulevard, Westwood Village, Los Angeles, California."

The Witness: Prior to that time I had some discussion with the Navy Department in connection with tying up with the Ryan Aeronautical Corporation, for the purpose of carrying out the terms of these contracts.

The Clerk: Defendant's Exhibit LL.

(The document referred to was received in evidence and marked Defendant's Exhibit LL.)

[308]

The Witness: After I had had various difficulties in getting going with those sub-contractors, I then started a plant of my own. I am talking about one of my own now, under which these contracts were started at 1005 Broxton. The Navy Department gave me financial support to start my own factory.

(The witness then described his offices)

(Testimony of Edward F. Zap.)

We had two safes, one safe was in here; this safe was used for all of the technical, confidential papers from the Navy; and then we had another safe in here which was used for all of the books and financial matters. The second floor was identical as the ground floor, except with this addition to it. In other words, the second floor was right on top of the same——

I got a third contract from the Navy while these two were in progress. Contract 41909. It was practically $66,000, somewhere around there. That contract was entered into about September, 1942.

I received instructions from the Navy, someone in the Navy, on or about the 3rd of November, to put our flaps on some planes at Douglas Aircraft. I received the letter and I discussed the matter when I was back in Washington, we discussed it very clearly with the Bureau: that was November 3, 1942.

I was arrested on the 5th of November. I remember going to the University of Washington wind tunnel. I was up there [309] so many times—on so many days.

Referring to these two contracts, 83142 and 4195, as I recollect, we had wind tunnel items there and we started on this right in the early part, ahead of signing of the contract. It must be in January or February, '41. I went up to Washington and decided it was a complete model for the boys to use OS-2-U, which we tested up there.

(Testimony of Edward F. Zap.)

In connection with our work at the University of Washington wind tunnel, I hired a number of students up there in off hours. I paid those students out of my pocket, petty cash.

The purpose is manyfold: in the first place, there was a scarcity of wind tunnels throughout the country, after Pearl Harbor particularly and allocation of tunnel time we had to make allocations months ahead of time to get the use of the tunnel and they had a drawing up there to allocate to the various companies, Boeing and Douglas, and others, and I was allocated a small amount of time; I could only use around five days or six days; in other words, one week, and then I had to delay and come back next month, was the reason why we tried to cram in one month as much test as we could so first, for our own purposes to get this data as quickly as possible; second, we didn't want to go back a month later; third, the reports coming from the University were always two or three months late and, of course, the war was going on, the Bureau pressed for the results, so [310] it was evident that we had to try as fast as possible to get our data on the tunnel.

During the year 1942, and particularly around June of 1942, in my office I had directly about 45 to 50, or 52 people; indirectly, some contracting, hard to say—between 50 and 250 people.

We did the engineering and the scientific work and the research. I attended to the tunnel, the engineering designing. I had a bookkeeper at all times.

(Testimony of Edward F. Zap.)

Harry Champlin started off and towards the end of it number one bookkeeper and then number two was Miss Ethel Boyle. I also had a certified public accountant. That certified public accountant was Mr. Cedric Browne.

After Pearl Harbor, you see, the situation changed completely around. Harry Champlin was the administrator of all the finances and all, attending to finances, getting the money in, getting the bills out, collecting, and so on.

If one of my employees came in and handed me a bill at my desk, I took a glance at it, what it refers to, and if it appeared to be reasonable or correct, I signed it.

I relied very much on the Navy cost accountant Miss Ethel Boyle, a certified accountant, Cedric Browne.

The Court: Anybody else? Anybody else that had anything to do with the books and records, making out the bills, that you remember? [311]

The Witness: Well, some of the girls might have helped in typing bills.

The Court: But those were the main ones?

The Witness: They were the main ones.

In connection with that work, I spent some money out of my pocket; I paid the students out of my pocket; it was in cash. On these wind tunnel tests I usually lost money, because in the beginning I forgot to take the money out; I put all out of my private things and forgot to collect it. That was in the period of 1941.

(Testimony of Edward F. Zap.)

In 1942 I think I collected more than $500 for that work; I can't tell you specifically, four or five hundred dollars; there were so many five-hundred dollars.

Referring to an invoice of $500 in Government's Exhibit 30 in evidence, signed June 29, 1942, the invoice is not correct when it states for electric power. The cost—it was thrown around like a red herring, the cost of electricity is very low.

The Court: How much is that invoice?

Mr. Lavine: $500.

Q. By Mr. Lavine: Now, in connection with the $500 item who, if you know, made out that particular invoice? Who made out that invoice for $500?

A. Referring to these what I have seen?

Q. Yes, the one I showed you. [311-a]

A. It was made out under Harry Champlin's direction. He mailed—made it out—I don't know—I don't know—I was too busy.

The Court: Now, that may go out.

Q. By Mr. Lavine: When that was handed to you, did you—do you recall now what you did in connection with it, particularly whether you read it, or didn't read it, or what you did?

A. Of course this is—

The Court: No, no.

Mr. Lavine: You can answer that.

The Witness: I probably took a glance at it, wind-tunnel, $500, and signed it. I know I was in the wind tunnel many times.

(Testimony of Edward F. Zap.)

The Court: That may go out. Wait a minute. That may go out. Your observation is that you glanced at it and signed it.

The Witness: That is correct.

The Court: All right. Proceed.

Q. By Mr. Lavine: Now, did you actually perform for and in behalf of the United States Navy $500 worth of work in the wind tunnel for which you had received no reimbursement at the time you presented that invoice?

Mr. Maury: Objected to as calling for a conclusion.

The Court: This is proper direct examination, counsel. You will be able to go into that matter more fully, but he is just examining him now, just the same as if a man had a con- [311-b] tract to go from here to San Francisco and back, under orders of the Navy, and you were to say to him, "Did you go up there and back?" And he would have a right to say, "Yes, I went up and back." In other words, establishing the services. I think that is proper. Proceed.

The Witness: Repeat the question.

Mr. Lavine: Read it to him.

(Question read.)

The Witness: Yes, I did, and more.

The Court: Now, just a minute. You have answered it.

Mr. Lavine: All right.

Q. By Mr. Lavine: And was that claim for the

(Testimony of Edward F. Zap.)

actual amount of money that you received correct and just?

A. To the best of my recollection, yes.

Q. And had you received for that work any payment at any other time?

A. Not that I recollect.

Q. Now, Mr. Zap—— A. May I explain?

The Court: No, no. You have explained it. You said you didn't.

Q. By Mr. Lavine: Now, Mr. Zap, there has been—Mr. Zap, were there any charges that you made in connection with the work at the wind tunnel where you didn't perform the services in accordance with your understanding of the [311-c] terms of the contract? A. Do I have the question?

Mr. Lavine: Read the question to him.

(Question read.)

Mr. Lavine: Let me reframe that.

Q. By Mr. Lavine: Did you collect any money from the United States Navy for any work that you did not perform? A. No.

Mr. Maury: Objected to as——

The Witness: Not to the best of my knowledge.

The Court: Let the Government put in the objection.

Mr. Maury: Objected to as calling for the conclusion of the witness, and asking the witness to decide the point at issue.

The Court: It is a matter for the jury finally, and then on the cross examination, counsel, you can

(Testimony of Edward F. Zap.)

take the matter up. I will allow it. The jury are not bound by the statements of any witness on the stand, whether they are Government witnesses, or whether they are witnesses for the defendant, the jury are to determine the case from all the evidence and what the facts are. I am sure that is agreed to by everybody. So I will permit the question to be answered. It has been answered. Proceed.

Q. By Mr. Lavine: Did you at any time intend to falsify any account submitted to the United States Navy? [311-d]

A. No, at no time.

Q. Did you willfully, falsely, fraudulently, or any other way, present any bill to the Navy and the United States which you believe to be unjust and to which you did not believe you were entitled?

A. I never would do a thing like that.

The Court: No, now. No.

Q. By Mr. Lavine: Your answer is no?

The Court: Strike out everything except the word "no". All right. All right.

Q. Now, Mr. Zap, there has been considerable discussion here about project 15, and that relates to the first—the matter is charged here—what is project 15?

The Witness: Project 15 is the fifteenth project we carried through. We made 14 before that: one of the contracts [312] requested by the Navy to investigate or report something which they needed, a gadget or a complete airplane; all in the books.

(Testimony of Edward F. Zap.)

open, and the report—I can report every project we did—blow back and flaps and all kinds of things. And the project 15 is project 15. In the project 15 we made a cargo plane.

As to project 15 relating to a cargo plane, no—it could be so—it could be so on any airplane. I did do some work on a cargo plane in connection with my experimentations. I made a complete report in December, 1941, with 12 pictures and figures of aerodynamic data of performance, and submitted it to the Navy and the Army for a cargo plane, to carry a whole Chrysler tank, 28 tons, for a stretch of 2,000 miles, or carry 20,000 pounds of bombs and material, and what have you, over a stretch of 9,000 miles; the range of that airplane is 16,000 miles without refueling, making possible the utilizing of this lifting increase device.

I later had some discussions in the Bureau of Aeronautics starting a cargo plane. I cannot place the correct date, it was somewhere in—the exact date—the first discussion was on the last visit to Washington in the fall of 1941. I discussed the matter with the engineering division of the Bureau, probably Captain Stevens—Captain Diehl. I had been told by those officials that the Navy—I had been told by those officials of the Navy that it was proper for me to carry on experimentations. The first thing, [313] it was before Pearl Harbor they were interested in having a supply airplane for cargo supply and for bases—naval bases—and after

(Testimony of Edward F. Zap.)

Pearl Harbor, of course, it was for a different purpose, to carry torpedoes to various bases in a hurry.

Mr. Lavine: They have been trying to show project 15——

The Court: Yes.

Mr. Lavine: ——is a cargo plane, and that he had no authority under these contracts, and I am proposing to show he had full authority under these contracts, under TD-5000, and under the discussions he had with the Bureau back there where he was given authority.

That under the terms of the contracts which are here, and which I read in part to the jury, you recall any new experimental work——

The Court: That is right.

Mr. Lavine: —of any discovery, or any invention to it, he had to report back to the Bureau whether it was specifically provided under the particular work outlined in the work section of the contract or not. In other words, the Government was interested in getting anything that could be developed in its interests. Now, had he written a letter back your Honor's ruling appears to me to be that that letter, and the correspondence in connection with it, is properly admissible, but instead of that he went back in there in person and he reported to them the development under these [314] contracts and his discovery.

The Court: That is my point, Mr. Lavine. Is the Government challenging here that he made some

(Testimony of Edward F. Zap.)

inventions and didn't report them? There is no such charge.

Mr. Lavine: I understand they are charging him, if I understand the Government's position here, they charge a certain project which they have called project 15, and which relates to some experimental work that he did, and that should not be properly chargeable to the contract. Now, in defense of that, I am saying——

The Court: Is it the position of the Government that all of that project 15 is not properly chargeable?

Mr. Maury: The Government has two positions here, your Honor. One is, in the first place, it was not properly chargeable, and the books were falsified by failure to enter charges upon the books prior to about the 23rd of October, 1942, while this work had been going on for approximately a year. That is the position of the Government under the indictment. Furthermore, it was covered up by trick, scheme and device.

The Court: Is not the Government's position that project 15 was not either contract, or any account under it; is that correct?

Mr. Bings: That is correct, your Honor.

The Court: Mr. Lavine, what provision in the contract does it come under? I think we can clarify that. I think [315] Mr. Lavine read the instruction there—experimental work should be included.

Mr. Lavine: That is correct, your Honor. The

(Testimony of Edward F. Zap.)

contract calls it, and the contract must be performed under the provisions of TD-5000 which I read, for the balance of the regulation and services called for in each contract, that the Government will pay the contractor the true cost as determined by the Bureau of Supplies and Accounts, in accordance with the treasury decision, TD-5000, of the federal register, pages 2788 and 2797, as amended by IT-3400.

The Court: My point is this, I don't believe that the Government would be chargeable for any work that was done prior to the date of the contract. What is your position on that?

Mr. Lavine: This particular case, your Honor, they would, because that is the contract as I read it before, states that all of the various four contracts are merged with this contract; that is to say, that this is a continuation of four other contracts which he had prior to this one.

Mr. Maury: The witness testified to that. I don't know where it is just now.

Mr. Lavine: It is here. The witness didn't testify to it. I read it out of the contract. Subdivision 2 of the paragraph.

The Court: What is the date of this contract?

Mr. Maury: It is about May, 1942, your Honor.

[316]

The Court: I am not going to invade the province of the jury in these matters.

DAVE ALDEN LICHTY,

called as a witness by and on behalf of the defendant Zap, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Just a minute, Your Honor, I haven't been subpoenaed on this, as a witness.

The Court: You what?

The Witness: I have not been subpoenaed as a witness in this case.

The Court: That doesn't make any difference.

The Witness: I still have to testify? All right. Dale A. Lichty.

Direct Examination

By Mr. Lavine:

I am employed by the Navy Department as a civilian employee; I have been so employed since April, 1942; I work out of the office of the Inspector of Naval Aircraft, El Segundo. That's with the Douglas Company.

Q. Now do you remember an occasion when you were over [317] at Mr. Zap's office some time in 1942 in connection with a bill that was presented to Commander Scott?

A. Well, I would have to know which one, because I was there on several occasions.

The Court: That is right.

Mr. Lavine: Well, I will ask you if in connection with the bill—I will have to get that.

Mr. Maury: I suggest he should be shown the bill.

(Testimony of Dave Alden Lichty.)

Mr. Lavine: Yes, I am getting it.

The Court: Yes, counsel is trying to find it.

The Clerk: You don't know the number, Mr. Lavine?

Mr. Lavine: No, I don't know the number.

The Court: Counsel for the Government may help you, if you tell him.

Mr. Maury: Yes, surely.

Mr. Lavine: It was the bill upon which Champlin testified.

Mr. Binns: I think it is 19.

Q. By Mr. Lavine: Do you recognize that bill?

Mr. Maury: What is it? Government's Exhibit what?

Mr. Lavine: What is that?

The Court: Government's Exhibit what?

Mr. Lavine: Government's Exhibit 19, in evidence, referring to a bill for some work that was done at Daggett Field. [317-a]

The Witness: What's the date of this document?

Mr. Lavine: Well, it must have been some time in October, because Commander Scott certified to it from the 25th of September to October 4th, 1942, so it must have been after that date. The letter does not bear any particular date. It must have been on or before the 16th day of October. Between the 4th and the 16th.

The Witness: Well, I have seen it, yes.

Q. By Mr. Lavine: Were you present when this was presented to Commander Scott?

(Testimony of Dave Alden Lichty.)

Mr. Binns: I object to that as immaterial. Commander Scott is no longer before this court.

Mr. Lavine: It is impeaching Champlin's testimony, your Honor. Champlin made certain statements about this. Now we seek to prove that those statements are false.

The Court: Well, then, just eliminate the defendant Scott and ask if Champlin was present.

Q. By Mr. Lavine: Who was present on that occasion?

A. Well, there was Commander Scott, there was Mr. Champlin, Mr. Hanley, Mr. Byars, Mr. Zap, and a third, or another party, in the back of the room, at a drafting table, whose name I do not know.

Q. What did Mr. Champlin say on that occasion?

A. Well, he handed these papers to Mr. Scott and said, "Here is the bill—" or "—papers on the employees that [347-b] went down to Daggett."

Q. And what was the reply to that?

A. Well, as I recall, Commander Scott looked at these papers, "Well, how do I know they were down there?"

Mr. Binns: I object to that, your Honor, and ask that the answer be stricken as beyond the issue of this case, hearsay.

Mr. Lavine: It certainly is. It shows Champlin's statement here was incorrect.

The Court: Well, it is your position they cannot challenge a statement made by the Government on a material point of evidence?

(Testimony of Dave Alden Lichty.)

Mr. Binns: I submit, your Honor, this is no longer a material point in this case.

The Court: They are challenging the statements made by Champlin, who is one of the witnesses of the Government. Isn't that material?

Mr. Binns: If it is anything that was said by Mr. Zap, your Honor, it would be material. As to anything said by anyone else, it is not material.

The Court: But here is an agent established here of Mr. Zap, and we have permitted the acts of his agents who were fully advised to be introduced in evidence. The books, the records, they were all made by his agents. If I adhered to that, I would have to exclude all of those books and [317-c] records, because Mr. Zap never made any of them, but they were made by his agents, and authorized. On that basis, I think, counsel, I will admit it. Proceed.

Q. By Mr. Lavine: Just state what Commander Scott said.

A. Well, Commander Scott said, "How would I know that they were down at Daggett?" He said, "Have you checked and can you verify that they were there?"

Mr. Champlin said, "Yes, they were there."

And Mr. Scott turned to Mr. Byars and said, "Have you verified this?"

And he said, "Well, all you need is to certify as to the time."

And Mr. Scott called for a stenographer to take this letter or bill and have that certification typed on the side, and they called and Mrs. Hanley came

(Testimony of Dave Alden Lichty.)

in the room and took the paper outside and was gone about eight or nine minutes and came back with this typed on the side, and Commander Scott signed it. [317-d]

Los Angeles, California, Friday, April 16, 1943.
10:00 A. M.

WILLIAM L. BUTLER,

called as a witness by and on behalf of the Defendant Edward F. Zap, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

I am associate aeronautical engineer, civilian, for the United States Navy. I have been connected with the United States Navy since 1929, 14 years. Prior to that time, I was aeronautical engineer for the United States Army—up to 1917 to 1924 as inspector, and later aeronautical engineer for the Army. I am now stationed at Douglas, El Segundo airplane plant for the United States Navy. Throughout the year 1942, I was stationed at Douglas, El Segundo, and also all the plants that are under the cognizance of that office for the United Sttaes Navy.

During that period of time I had occasion from time to time to examine the work done by E. F. Zap. My duties in connection with that work were to check that work to see that it met the contract

(Testimony of William L. Butler.)

requirements and the specification requirements, the Navy specifications.

I am familiar with contract 83142 and the contract 4105, contracts held by Mr. Zap. I checked his work in connection with the University of Washington wind tunnel in connection [318] with the contracts; all that was permitted for forwarding I did. It complied with the contract requirements or I would not have approved it for forwarding. That was my job, to see that they did comply with the requirements.

In the month of September, 1942, or thereabouts, I had a conversation with Mr. Zap in relation to some of the reports that had been submitted; off and on, yes, I had to talk to Mr. Zap.

On the engineering work I don't recall any specific instances; on the inspection work on the floor, where something was built, it satisfied the requirements as I was concerned, and I said—or Mr. Zap said to me, "We are in a hurry; we are behind time," and I made the statement on one occasion to Mr. Zap, "That was satisfactory to me, good enough for the job it was supposed to do." And he said, "No, I don't want it that way. I want it better than that. I want it as good as we can build in the airplane for the United States Navy." That was more structural than engineering. That was actual construction.

I am familiar with certain work done by Mr. Zap in connection with what is sometimes called a cargo

(Testimony of William L. Butler.)

plane. I remember that cargo plane report. That was submitted to me for my examination.

Q. By Mr. Lavine: Mr. Butler, as an engineer for the Navy, have you an opinion as to the value of Mr. Zap's work in connection with the Navy?

[319]

Mr. Binns: I object to that, your Honor, completely irrelevant to the issues in this case.

The Court: Sustained.

The Witness: In connection with this cargo plane project and the matter that was submitted to me about it, the matter of completing the idea in his mind of what he wanted to do, he could sit down and make that report in two weeks' constant work, constant attention, one man, I believe so. That was furnished to me simply in comparison with another amount of work that was committed to me. It was just one report. I would like to bring out this point. A person who would sit down and make a general over-all in this case of an airplane, design the wing, how everything worked for an approved airplane, can go into hundreds of engineering hours; that would amount to many hours of designing in a complete over-all design. That is why I say one man could make such a report in two weeks.

Cross Examination

By Mr. Binns:

I do not recall that this cargo plane that you referred to, was known as project 15. I believe I did see wind tunnel data in connection with that plane.

(Testimony of William L. Butler.)

I read that complete report and I believe there was some—there was some wind tunnel data in it—in connection with it.

Q. This cargo plane, was that in connection with adapting a Zap flap to a Grumman plane? [320]

A. The other way around. A Zap flap could be adapted to the cargo plane.

Q. Will you please just answer the question? Wasn't a cargo carrying plane used in connection with adapting a Zap flap to the Grumman plane?

A. No.

Q. Was it in connection with adapting a Zap flap to the Sikorski plane?

A. No, I couldn't say that it was.

Redirect Examination

By Mr. Lavine:

I am the officer through whom reports are forwarded from—I am the first officer to whom reports are presented to be forwarded to the Navy; that is my job, yes, sir.

HARRY S. MAGILL,

called as a witness by and on behalf of the defendant Edward F. Zap, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

The Witness: My name is Harry S. Magill; I am an aeronautical engineer; have been such since

(Testimony of Harry S. Magill.)

1926; I worked for Mr. E. F. Zap from June of 1940, until December 31, 1941, as Chief Engineer.

Mr. Zap and I worked together to try to figure out a [321] proposal to the United States Navy for cost for test flights. We worked on that approximately three weeks, as near as I can remember. The proposal was to cover the entire flight program to prove the airplane in accordance with the design so it would be okay to submit to the Navy.

There was a proposal of $4,000 made.

Exhibit 3 in evidence is the proposal that we worked out. It refers to contract letter 143 with the provision "Chief Test Pilot fee and insurance $4,000." It is dated January 29, 1942.

The preliminary form was worked on in the latter part of 1941. We had planned to make the flight test sometime about that time, but it is entirely dependent upon the date of completion of the device for the airplane.

There was discussion between me and Mr. Zap as to presenting the proposal in the form of a fixed-fee item.

I am acquainted with the various items that go into making a flight test. Besides the actual flying of the airplane, there are a number of items involved from the standpoint of preparing for the flight; the program must be laid out thoroughly from an engineering point of view; arrangements must be made for airport and hangar space; the fuel and oil must be provided; a ground crew for

(Testimony of Harry S. Magill.)

maintaining the airplane during the test must be arranged for and their salaries. The pilot himself must be contracted for, and, in addition to that, you have insurance on the airplane, insur- [321-a] ance on the personnel work around the airplane, and insurance on property that might be damaged in the event of a crash of the aircraft. Also definitely insurance on the pilot. Also on anyone in the plane at any time it is being flown during the tests. Other costs or charges in connection with flight tests are the transporting of the airplane to and from the factory, if the factory has no airport adjacent to it, and expenses for the personnel during their stay away from the factory, during the tests. As a rule the transportation of the pilot from the place where he is going to fly is agreed upon at the time the pilot is contracted for.

I went back to Washington with Mr. Zap on two occasions; I also went to the University of Washington with Mr. Zap and did work in the wind tunnel. I went to the University of Washington on several various tests, but not in December, 1941. I went under another contract, and also for this contract. The wind tunnel tests were different from the field tests. The wind tunnel tests were carried on at the University of Washington. I was not in Mr. Zap's employ at the time the flight tests were made, but was when wind tunnel tests were made earlier in 1941 under Contract 83142 at the University of Washington. On one occasion, under the contracts

(Testimony of Harry S. Magill.)

here, I went up to the University of Washington myself and ran tests on tail surfaces. That was rather early in the year; I don't remember the exact date but I would say between the first of the year and the middle of the year. That [321-b] was my last trip there. I had gone up there with Mr. Zap though. I saw Mr. Zap pay students personally.

Cross Examination

By Mr. Maury:

The Witness: Government's Exhibit 3, and particularly the letter therein of January 29, 1942, was written almost a month after I left Mr. Zap's employ. In the original preliminary estimate, before I left, I inserted that figure "$4,000." I based that figure on the pilot's fee and any expenses incurred necessary for him to carry on the flight test. As an engineer I did not study out what the pilot's fee would be. Mr. McAvoy came from San Francisco on a special trip to talk in regard to taking on this job; he and Mr. Zap made the arrangements for his fee at that time; that was before we made the estimate. I sat in on most of the conferences, the first of which, I would say, was around August of 1941. This took place in Mr. Zap's office at 1005 Broxton Avenue in Westwood. Mr. McAvoy was in town for about two days and was beginning to familiarize himself with the characteristics of the airplane he was going to have to fly. Leaving out the technical discussion, and getting down to the financial figures, I did not discuss finances directly with

Mr. McAvoy. That was entirely up to Mr. Zap. I did not discuss these figures with Mr. McAvoy, but I know the outcome of the discussion, as Mr. Zap and I had to discuss that work [321-c] together in forming the proposal. Mr. Zap told me the outcome was that Mr. McAvoy was to have a flat fee of somewhere around $2500, as I remember, exclusive of his expenses and whatever things were necessary items that came up that would be thrown in on the flight test program.

Redirect Examination

By Mr. Lavine:

The Witness: Mr. McAvoy's fee was definitely to be a fixed fee; that was to be $2500, plus whatever expenses he would incur.

Mr. Zap discussed with me on several occasions whether or not the flight test should be on a fixed fee basis or cost plus basis.

Nothing was said as to how many trips Mr. McAvoy was to make in connection with the flight.

Mr. McAvoy was to be paid directly by Mr. Zap.

[321-d]

EDWARD F. ZAP,

recalled as a witness in his own behalf, having been previously duly sworn, was examined and testified further as follows:

(Testimony of Edward F. Zap.)

Direct Examination
(Continued)

By Mr. Lavine:

Q. Mr. Zap, we heard considerable about cargo planes yesterday just about the time court adjourned. Will you tell us about when this cargo plane was conceived by you?

A. The first thing was in December, 1941. I had a previous discussion with the Bureau about cargo planes.

The Court: He has told us about the cargo plane and when he first had his discussions with the Navy about it in Washington.

The Witness: I was not doing any work during the period we have discussed here in 1941 and 1942 for anybody but the Navy. The Navy at times gave me directions to assist other branches of the Government service. They sent me a letter authorizing me to release—I followed the instructions in the letter, to supply information to such and such a company.

In connection with this so-called cargo plane, I sent a letter to the Navy Department. I submitted a report to the Navy Department on it, a report, project 15, cargo plane, in December 1941.

In reference to a report marked "Confidential, Zap Upper Surface Flap, Zap Controllable Lift Wing, Preliminary," that report contains the whole story about the cargo plane; [322] the submittal to the Bureau. I submitted that report to the Bureau

(Testimony of Edward F. Zap.)

of Aeronautics in Washington, D. C. It went the regular channels, via the Navy inspector, to Washington. It was examined here by the Navy inspectors, Commander Smith, and so on, and then it was forwarded to Washington.

The Clerk: That will be Defendant's Exhibit MM; into evidence.

(The document referred to was marked as

DEFENDANT'S EXHIBIT MM,

and was received in evidence.)

Mr. Lavine: I would like to read the first part of this exhibit MM, in evidence.

"Summary

Results are given of recent tests on Zap Controllable Lift Wings in combination with leading edge auxiliary purposes. Optimum combinations attained a CL max. of approximately 4.00 which was accompanied by much smaller pitching moments than are usually associated with high lift devices, thus making possible a considerable reduction in required tail area. A general specification for a load carrying airplane as dictated by military necessity is presented and an airplane designed to take full advantage of the Zap high lift devices is postulated. Several alternative power plant installations and alternate arrangements of the various basis components are suggested. Curves are presented showing estimated [323] flight perform-

(Testimony of Edward F. Zap.)

ances for a hypothetical airplane of 87,500 pounds gross weight. The empty weight is estimated to be 25,000 pounds, thus giving a ratio of gross to empty weight equal to 3.5."

And there follows a copy of all the curves and the diagrams and the pictures of the plane.

I am now reading from another page.

"Provision is made in Design A for the installation of four motors by which means the power plant may be doubled. It must be appreciated, however, that the plane was originally designed for comparatively slow speed, high-load performance, and consequently will not be operating at maximum efficiency with this additional power. A comparison of the resulting performance is of interest nevertheless, as being indicative of the performance to be anticipated in a design adapted to fighter performance.

The two additional engines will weigh approximately 5500 pounds, to which should be added a reasonable amount for engine mountings and the increased structural strength required by the higher velocities and heavier air loads to be imposed. Therefore, a round figure of 10,000 pounds has been added to the empty weight of the two engine plane, thus raising the empty [324] weight to 35,000 pounds. The gross weight remains unchanged, therefore the 10,000 pounds additional weight will be deducted from the available useful load.

The 4-engine performance has been based on

(Testimony of Edward F. Zap.)

the military rated power of 1855 B.H.P. at 24,000 feet. Counter-rotating propellers of 15.4 feet are designed for maximum propulsive efficiency at high speed at this altitude. The curves of power required for the two-engine design have been assumed to apply with sufficient accuracy to the 4-engine version.

A summary showing the resulting performance in comparison with the two engine version is given in the following table:"

And then follows tables showing the performance of normal rating planes and of military, 4-engine planes:

The Witness: Subsequent to taking this matter up with the Navy, I was referred to some other branch of the United States Government by the Navy. I was sent to the Army. At the Army, I saw Colonel Craigie, in charge of new projects. It was on the way home from Washington, D. C., via Dayton, Ohio, to Los Angeles.

It was on the way back from Washington, D. C. I stopped in Dayton, Ohio, to the Army materials center, and discussed these things with Colonel Craigie, the chief of new [325] procurement and new designs, at the recommendation of the Navy. I submitted my proposal for the cargo plane at that time to the Army. I wired for a second copy of the report and waited for it, and forwarded it to the Army. The connection between the cargo plane and the other work I was doing for the Navy was simi-

(Testimony of Edward F. Zap.)

lar, the same, around the same thing, involving flaps and ailerons, the new development.

The relationship between the cargo plane and the other experiments that I was doing on the Grumman and the Vought-Sikorski was this. The thing started as project 15, cargo plane, and the "cargo" was struck later on and the "Project 15" was maintained, because on the cargo ship we needed thick wing sections, and later on in the year we needed for the Grumman a thick wing section, for ammunition boxes, and we had to go to the same thickness of wings, so we carried on the same project number and went in the wind tunnel to investigate the thick wing section, the effect of the downwash to the tail. The photographs and the report explain clearly the purpose of those tests. The reports were sent in to Washington.

I stated that I received instructions from the Navy to take up certain other work with the Army and other work in connection with my Zap flap. I wrote a letter dated February 10, 1942, after I received the letter of invitation to submit such things to the Army; an authorization from the Navy and an invitation from the Army; there are two letters, and a [326] telegram. I was conducting these tests at the University of Washington, and all of them, I honestly believed that they came within the terms of my contract—every one of them. And in making my reports on my work I honestly believed that they

(Testimony of Edward F. Zap.)

were in full compliance with each and every provision of the contract with the Navy.

My office staff made out the invoices that were made out to the Navy. My office staff checked and presented them to me. And when those were presented to me, the basis I signed those invoices was that I relied completely on my staff. They gave me something prepared. And that's what they were there for.

I did not at any time ever knowingly or willfully present any bill, either on September 23, 1942, or at any other time, which I believed was not performed in accordance with contract NXs-4105, or any other contract with the United States Navy.

I did not at any time knowingly make or cause to be made or use a false bill, receipt, voucher, roll, account, claim, certificate or affidavit, knowing the same to contain fraudulent and fictitious statements and entries.

Referring to Government's Exhibit 19, a letter dated October 16, 1942, that was presented by my office staff. They laid it before me, Mr. Champlin. As to whether I remember the particular circumstances of signing that—or remembering how many papers or whether that was alone, there [327] never came a single bill. A cluster of them. Mr. Champlin gave me a pack of things to sign. Invoices to sign —I never paid much attention to it.

By Mr. Lavine: Now, Mr. Zap, do you remember the circumstances surrounding a check that was later

(Testimony of Edward F. Zap.)

—let me give you the check, Government's Exhibit No. 7, in evidence. Just state all the circumstances as you remember regarding that particular check.

The Witness: We had to go to Daggett, continue the flight test at Daggett Field, and before leaving I asked Mr. Browne what does he want in the way of information or confirmation of our records about the flight test fees and insurance, because we had already paid a large amount of insurance fees and our incidental expenses.

He advised me—anyways, either I sign a check and have it endorsed there by Mr. McAvoy, or advised—I can't recollect correctly. All I remember is I signing a check and Mr. McAvoy endorsing it; or it was made out to Mr. McAvoy, and him signing it. Something around that. Anyhow, I received a blank check, from Mr. Browne. We have those checks showing to which account; and the number, that is taken out, it is entered in the books for what purpose the check is, and to which account it goes; and there is written, of course, in the left corner "3-15A." That refers to all these quotations and stuff. In other words, the check is pinned down for which account or which part of the perform- [328] ance it goes.

My job was, now, to sign the check or get the endorsement from Mr. McAvoy. And I knew we were going up to Daggett, and anticipated—Mr. McAvoy was with us already over ten days, he was anxious to go back—anticipated after the flight test

(Testimony of Edward F. Zap.)

is finished that he might jump in the airplane and go right back to San Francisco; so I intended to take the check with me and have it signed by him. Then what really happened, I think, half a day or so later, or the same day, I saw Mr. McAvoy in the office before we went to Daggett Field, and I asked him in the office "Mac, will you sign the check, that I can turn it over to the accountant to have a record for our own office that this thing, this particular item is cleaned up?"

And he countersigned this thing, and I don't remember clearly, I think I took that check with me. We were in a hurry to go to Daggett Field, the plane was flying out there with McAvoy, and I believe I took that with me to Daggett Field and had it all the time out there in my pocket, and when I came back to Daggett Field—yes, I remember clearly I had it at Daggett Field because I cleaned out a pocket in the hotel, and I had that check with me.

When I came back I went to Browne's desk, or Miss Boyle's desk, signed the check, I said this is what Browne is asking for.

That is all I remember about the check. [329]

I did not direct anyone to fill in any amount on that check. I didn't recall at that time how much. I didn't have those figures in my mind. I had the flight test in my mind.

I did not at that time or at any time intend to use that check in any way to make any false record or false account or false accounting in my books. This

(Testimony of Edward F. Zap.)

was my own check and my own account, writing it out against my own account. I didn't know the purpose what Mr. Browne needed.

In presenting the claim to the Government for $4,300 in connection with that flight test, it was my belief that that item was a fixed price. If I am permitted to prove it, I will prove it right now. I honestly believed that it was a fixed price. And I did then.

Now, in connection with that particular item of account, the contract or the letter calls for "flight test and insurance." It says here specification 38C. It says report No. 135, proposed preliminary flight demonstration. That report explains clearly what has to be done at fixed prices and what has to be done on cost plus. The standard Government test is fixed. This is a standard fixed thing. We did it before and we did it afterwards. That very same letter which counsel has in his hand. The second to the last paragraph states it.

January 29, 1942, Government's Exhibit No. 3, in evidence. It says additional flight tests have to be done. It says [330] very clearly there.

Mr. Lavine: "It is the contractor's intention to make additional flights to determine results of various aileron-vane settings, tuft tests for observation of flow characteristics, take-off and climb tests involving various flap positions, minor aerodynamic investigations and adjustments to enable the contractor to submit the subject airplane for final

(Testimony of Edward F. Zap.)

demonstration in its most advantageous condition. For this reason it is highly desirable to have flights after the first pilot's familiarization flight."

The Witness: That other letter which the Government counsel mentioned is the other one.

Mr. Lavine: It has a reference to enclosure A: "And make observations useful to the Bureau of Aeronautics." I assume that is what that is. "Bu-Aero."

The Witness: When I was conducting this flight test, I had paid other items in connection with the flight test than just the pilot's fee. There is a manyfold insurance item in there. The insurance items which I am required to make for my own protection. The items of insurance that I placed on that flight test were pilot's insurance, liability insurance to employees when they get hurt, damage insurance in case the airplane crashes on a barn or a house, ground insurance. There are six types of insurance. I can't remember it without looking in the records, correctly. Six different types of insurance I am required to make. And there is another [331] group of insurance which are required for the Government, which were cancelled.

One of the witnesses testified that insurance covered all the members in the plane that might be injured at the time of the flight; that is correct. There was about $1600 worth of insurance. There were two firms, Lyddy Zweigart, Harry H. Kem handling my insurance and I made a check with

(Testimony of Edward F. Zap.)

Harry H. Kem as to the insurances that were taken out on my flight tests.

The first type of insurance is flight test liability insurance in the operation of my business. That means any employee comes around an airplane and the propeller flies off and he gets hurt, I have to be protected to cover him. That letter says that was for $297.05 paid on August 31, 1942.

The next item, August 1, 1942, policy WC 426501-A, Workmen's Compensation on all employees with the exception of actual flying. You see, the first one is business. This is working around the airplane. Then comes the next insurance—this was $150. The next insurance is August 27, policy No. 6 EA-375, Aetna Casualty Company, policy covering accident insurance for Mr. Dale while flying. Mr. Dale was the co-pilot on the flight tests. He was flight engineer. This policy covered accident insurance of Mr. Dale while flying, or related—$250, here it is, and paid.

The next insurance item is—no. For $135 of $10,000, [332] for Mr. McAvoy, for a period of ten hours, and for every additional hour's flying in an airplane I have got to pay $13.50. Mr. McAvoy flew 31.8 hours, total flying time. Additional fee had to be paid for Mr. McAvoy, there is a notation here, $283.50. I don't recollect if he's paid or he's not paid, I don't know.

The next item is policy taken out August 25th, policy No. 96 C-335, U. S. Aviation Underwriter,

(Testimony of Edward F. Zap.)

covering Workmen's Compensation on all aircraft operations. "This policy was written to cover your liability for employees flying in any type of airplane other than commercial airlines on regular schedule." It amounts to $251, and the premium was paid.

I am not sure about that next item. We took another insurance out here August 25th. "We issued binder No. 3475, U. S. Aviation Underwriter, covering crash insurance." I think this is a Government insurance which was cancelled later on. Without looking at the records I can't explain that situation.

The next item is August 20, 1942, binder 3474, U. S. Aviation Underwriter, covering comprehensive insurance on OS2U-2, of $80,000. This binder was for ground coverage only and did not include any crash insurance. The short rate premium on 30 days was $560. I am not sure. I think this is the insurance I am required to have in case the airplane under transport out to the field burns up and I have to replace it; or it might be insurance which the Government [333] cancelled later on. I don't know. Without looking the records up I can't tell.

Then there is another insurance here, August 29th, binder No. 3476, U. S. Underwriter, covering public liability and property damage. The limit of this was $100,000 public liability and $50,000 for property damage, and the premium $77.80, was paid.

Then there is a discussion here in that letter about insuring Mr. Dale extra, but it doesn't quote. I think that was said in the beginning of the letter.

(Testimony of Edward F. Zap.)

Then there is my insurance; it was at that time paid, $122.70, policy 1165680. When I speak of my insurance, that is insurance while making the flights. As I recollect, I took insurance out and I was mistaken in it. You see, I was insured, and it turned out I cannot fly an experimental airplane, only after the Government has approved that airplane, so I was actually not insured, and I was supposed to pay an additional premium. If I paid it or not I don't recollect now without looking up the records. But we paid $122.70 for me. That is all.

In addition to the insurance, I paid other expenses of Mr. McAvoy. First is fee, which I have a notation here, $2,075; $300 cash, and $200 check, plus—I believe there is a petty cash of $50, which I don't know where it belongs to, but he probably got the petty cash of $50 when he went——

There is a stub in the petty cash of $50 paid to Mr. [334] McAvoy, made out by Miss Hanley. I recognize that invoice—this is Miss Hanley's handwriting, and it says "Mr. McAvoy, 10-6-42, $50, flight test fee part." I found it in my office records.

The Clerk: Defendant's Exhibit PP into evidence.

(The document referred ~~to was received~~ in evidence and marked Defendant's Exhibit PP.)

The Witness: Other expenses of Mr. McAvoy that I paid were his travel expenses from home to Los Angeles, down here, and his hotel bills and his food. I have notations here. $9.09, Claremont Hotel. $41 twice, two times forty, traveling reimbursement

(Testimony of Edward F. Zap.)

to Mr. McAvoy to San Francisco and back. He went twice to San Francisco and back, so that makes $82. Then I have $155.80, expenses for a conference. We went to Moffett Field to obtain some instruments from the N.A.C.A., and Mr. Dale went up there and had a conference with Mr. McAvoy and another test by Clousing, to line up the flight. [335]

Los Angeles, California, Friday, April 16, 1943.
1:30 P. M.

W. L. BUTLER,

called as a witness by and on behalf of the Defendant Edward F. Zap, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Lavine:

Q. Mr. Butler, certain questions were asked you this morning and I want to ask you now if since the questions asked you, if you can tell me if the experimental work done in the wind tunnel in relation to the work under contract NXs-4105?

A. Yes, it could. Through the determination of a desirable wing section for a thicker section.

Cross Examination

By Mr. Binns:

The Witness: This report marked defendant's Exhibit MM, does not look like a copy of the report

(Testimony of W. L. Butler.)

I referred to this morning as the report I saw on the cargo plane. That report, as I recall, was several times thicker than the Exhibit.

Redirect Examination

By Mr. Lavine:

The Witness: Examining this report, it is part of the [336] audit I saw in the more complete report; this familiar—that sketch—the same thing.

Recross Examination

By Mr. Binns:

The Witness: When I said, "It is the same thing," I meant that the part I looked at was the same. The pictures look identical with something I saw in the larger report.

EDWARD F. ZAP,

called as a witness in his own behalf, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Lavine:

Q. Mr. Zap, this morning I asked you whether you were working entirely in connection with matters of the Navy, and whether you secured permission to do any work for any [336-a] other agency or persons from the Navy involving any matters taken up, and you said there was correspondence between you and the Navy.

(Testimony of Edward F. Zap.)

The Witness: Defendant's QQ is a letter which I received from the Navy Department on January 21, 1941. The work that was stated in this letter had to do with these two contracts. It related to the rules of information regarding Zap flaps and ailerons.

(The document referred to was received in evidence and marked Defendant's Exhibit QQ.)

The Witness: I addressed a letter on April 20, 1942, to Commander Walter F. Diehl, now Captain Diehl, in the Navy Department, Washington, D. C. I received a reply from Commander Stevens of the United States Navy on April 21, 1942, in relation to that report. They have a relation to Counts 1 and 3, the experimental work that was being carried on in the wind tunnel.

The Clerk: Defendant's Exhibit RR into evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit RR.)

Mr. Lavine: I would just like to read the last paragraph of Defendant's Exhibit RR in evidence.

"What is now required is a comprehensive investigation of the entire subject for the purpose of establishing the basic principles involved and the determination of sufficient data for general design purposes. [337] One has but to consider the vast amount of money and time already expended in research upon the split flap and conventional ailerons to appreciate the

(Testimony of Edward F. Zap.)

extent of the program ultimately required to explore fully the possibilities of the roll-out type flap and upper surface aileron. However, in consideration of the military significance of this development, it is felt that everything possible should be done to get this work under way at the earliest possible moment. Considerable additional tunnel work as well as further tests on the Navy Fairchild in the full scale tunnel and in fact will probably be required. In any event we will be happy to cooperate in every way possible in any program you may consider advisable.

Yours very truly,

EDWARD F. ZAP."

The answer of Commander Stevens "subject: From the Navy Department, Bureau of Aeronautics.

"Subject: Experimental program—Proposed for additional work"——.

The Court: Pass it to the jury, counsel—they can read that.

The Witness: After I received these letters for release of technical information in connection with the Zap flaps, I received a subsequent wire from the Lyster-Kauffman Aircraft Corporation, requesting me to furnish them some [338] data for work on an Army plane. I subsequently sought authority from the Navy to give them that information and received that authority.

(Testimony of Edward F. Zap.)

The Court: What is the materiality of this, Mr. Lavine?

Mr. Lavine: Just along the same line that all his work was done in connection with the Navy, and he did nothing, your Honor, outside of Navy work, unless he got permission from the Navy.

The Court: There is no contention he was working for any other company here, is there?

Mr. Lavine: Yes. The Government's contention was he had a private project, your Honor, not connected with anything with the Navy, and I am endeavoring to show all his work was done for the Government, whatever its nature was.

The Court: Let's get that straight. I don't think there is any evidence or any contention here that he was doing work for any other person, firm or corporation, during this time, but the Navy. I understand that. You don't mean he couldn't, if he thought of some other design, or something else, that he couldn't do that other work; that he couldn't work on it; he couldn't experiment with it?

Mr. Lavine: No. Under the contract and under TD-5000 encourages that, but says if he does it he has to——

The Court: Then what is this point of working for somebody else?

I sustain the objection.

Mr. Lavine: All right. [339]

The Witness: There were other expenses in connection with the flight test outside of the insurance

(Testimony of Edward F. Zap.)

and the pilot's fees and the pilot's expenses. I have here a notation—$200, travel expenses for Mr. Dale.

Mr. Lavine: Mr. Zap, what are you looking at? What is your memorandum?

The Witness: Just a piece of paper I collected the data from the correspondence that we paid for—just a memorandum for myself, which can be taken out.

$200, travel expenses to Mr. Dale to flight with experimental airplane to Anacosta was paid with a check, No. 2701, money advanced to Mr. Dale to fly to Anacosta with that airplane with a Navy pilot. And another $200 to bring him home. He was short of money.

The total amount spent by us, or incurred by me, for the flight itself, fees and insurance, and other expenses, to my best knowledge and belief: according to my memorandum it took some $4,587.64 to $4,787.64. I am not sure. We might have billed to the Government, in some form, one of those instances of which I am not sure, might apply it to the Government or not. Those figures were $4,587.64 to $4,787.64. I am not sure, something else might have popped up somewhere else. I just didn't have time.

In connection with the flight test charges, I never signed anything, except an invoice. After the work was done I did not sign or see anything except an invoice. [340]

I honestly believed that these charges that I billed

(Testimony of Edward F. Zap.)

the Government for on that invoice were just and correct, I now still believe that they were just and correct.

I did not at any time attempt by any scheme, or trick, or device, or other means, to present that item or claim as a false claim to the United States of America.

I did not at any time instruct anyone to make any false, or fraudulent, or fictitious entries, in my books in connection with that charge.

At the time that invoice was prepared, Mr. Champlin was keeping the accounts of the insurance at my place of business, at that particular time. Mr. Champlin secured the bids for the insurance.

A letter from the Lyddy-Zweigart Insurance Company, Defendant's Exhibit TT for identification, was one of the companies that was bidding on my flight test insurance. That letter is addressed to Mr. Harry Champlin.

(Mr. Lavine passes the exhibit to the jury.)

Witness (continuing): I went to Daggett Field in connection with the experimentation work and the flight test. I was up there about ten days, during the time that those flight tests were on. I was worrying about the flight test figures. I was attending to the engineering figures, and to the actual flight itself, and the flight itself to make the airplane work properly as intended.

While I was up there and after I went up there, they [341] all got dysentery up there from the water

(Testimony of Edward F. Zap.)

and heat conditions, and some of the persons left and came back.

Q. Now, did you certify to the men and amount of work that was done up there? A. I did.

Q. And what were the expenses under which you signed that certification?

A. It was laid before me, prepared by my office staff. I signed it.

Mr. Champlin laid the papers before me. As usual a rush in the office; particularly, after the flight test was over. He said that he wants to submit the paper to the Navy auditing. I believe he said, "Mr. Byars is over in the office somewhere," and I should sign the paper. I took a pen and signed it. I did not examine it closely and minutely. I honestly believed when I signed it that it was true and correct.

I never made any representation to Hilton Byars as to any item of expenses. I never made any representation to Mr. Hilton Byars. I never asked or said anything to Mr. Byars.

I had numerous little difficulties with Mr. Champlin. They first started somewhere in the spring or in the early part of '42—1942. He left after closing in the evening, left the desk completely untidy, papers and stuff laying around, and he often when he conferred with me and brought papers to me to explain, and wouldn't, but left them on my [342] desk, and I called his attention to it and I said, "This is not the way we like to run our business.

(Testimony of Edward F. Zap.)

When anybody leaves his desk in the evening the desk might have been cleaned under executive orders." The next thing there was some cheating going on with the time clock.

I discovered one time and I saw a spare time clock in one of the filing cases next to Mr. Champlin's and Mr. Hanley's desk, and the time clock was used to punch in or punch out time at their leisure. I watched these things and I found out that the time clock of Mr. Champlin and Mr. Hanley were punched in 9:00 o'clock in the evening and I did not recall seeing him there the night before, and I asked Mr. Champlin then, "Where were you yesterday," just casually—"I was at the draft board," pertaining to a meeting it would take some time to fix up somebody's draft questions, and we agreed to make that out—used to work overtime every Tuesday, Thursday and Friday, from 6:00 until 9:00 o'clock, and I noticed that on all those days Mr. Champlin, about 80 per cent of the time, was never there evenings, and I asked him several times, and he had always an excuse that he was at a draft board, or buying tires, or getting some tires for the employees. And it occurred so often and I got suspicious and he gave me another excuse one day, and I simply took the telephone call to the draft board, called up the draft board—I know the foreman of the board—and I said, "Was Harry Champlin there yesterday?" He said, "Yes." "What time he [343] came there?" Well, he said,

(Testimony of Edward F. Zap.)

"I don't know what time he came. We close at 5:15." And I went back and took the time card and here is punched at 9:00 o'clock evenings and I personally know he was not there that evening, so I took the time clock and went to Mr. Champlin and I said, "How about this thing? Where were you?"

And, "Oh, I had an awful headache," or some kind of an excuse that he was sick and at home and forgot about it. I said, "Who punched your time clock in?"

"Oh, Earl Hanley did that." And then I went in the files and found the second time clock right at the desk, and I said, "What is that time clock here for? Supposed to be in the safe in a great big room, and a great big quarrel started and Mr. Hanley came around and said, "Are you accusing us of cheating?" And I don't want to spread all kinds of gossip around here. That was one argument. Then I got Mr. Champlin in and on several times again he stamped in his time at 7:00 o'clock in the morning, and officially the hour to start work was 8:00 o'clock, and he used to sign the time check with somebody else, he held the pay checks and I saw $110, so I asked for the time cards and looked over how it could be that he gets $110. And here I saw time cards stamped at 7:00 o'clock in the morning, so I went to Mr. Champlin and I said, "Mr. Champlin, our office time is starting at 8:00 o'clock," and he said, "Well, Mr. Zap, I work must better in the morning. I am an early bird. I am up at 5:30

(Testimony of Edward F. Zap.)

and I would rather work while it is quiet in the office and I like to work [344] in the morning." So I tried to check up on that situation, and I had at one time stress men helping from Lockheed Aircraft, who was also an early bird, and he had to go during the day to Lockheed and work, so he worked in the morning and came evenings, and I saw him—I said, "You were there at 6:00 o'clock in my office to fix up a report?" "Is Mr. Champlin there?"

"Yes. I saw him come in at 7:00 and he goes out into the coffee shop with a motorboat or sailboat magazine and sits there," so I made it my business once or twice to go into the coffee shop and saw Mr. Champlin sitting reading a motorboat magazine and charging time to the company, so another quarrel started along that line.

Without going into all the quarrels that I had, I took up the matter of discharging Mr. Champlin sometime before I left for Washington. I had some discussion with Mr. Browne, my auditor, about replacing him. I asked three or four persons in my office—I asked Mr. Browne about it. I didn't talk to Mr. Champlin again about discharging him, before I went.

I had someone else in charge of my place while I went to Washington. That was Mr. L. Weaver. I gave Mr. L. Weaver instructions regarding the running of my office. I hired Mr. L. Weaver, to the best of my recollection—about three or four weeks before I went to Washington.

(Testimony of Edward F. Zap.)

The purpose of my trip to Washington was to follow up [345] the test flight and the beginning of the Government tests in Anacosta. Flight tests were continued in Washington while I was there. After I returned from Washington, I fired Mr. Champlin, the first day I returned.

Cross Examination

By Mr. Maury:

Yesterday I testified (page 1366 of the Transcript) in response to the following question:

"Q. Has any work been done on that contract at all?"

That was on the contract of September, 1942, and I responded as follows:

"A. A little. We started. Usually in the last year or two years we started ahead of time. You see, the moment we get a letter of intent that the Bureau needs something; that is the green signal, and we went ahead and started the work."

When I referred to a letter of intent, it is not very clear to myself what a letter of intent is. That is, I get a letter from the Bureau, it says—I have several of them in the correspondence which says this and this, "the contract is coming" or "we are making a contract in the early stages," and I assume that was a "letter of intent." And then later I get an education and find in the Bureau there is a special [346] form of letter of intent.

(Testimony of Edward F. Zap.)

I learned that on one of my visits to Washington, which one I couldn't recollect, I made so many. I couldn't tell if it that was in 1942, or 1941; my best recollection is, it was around in 1942. But I had letters from Washington which I thought were letters of intent prior to that time.

To go on with my explanation of what this "letter of intent" is, I still didn't know very clear, 100% myself. If I can look in the correspondence—I have a letter of intent somewhere in that file.

The Witness: This is one type but there were other types.

The Court: You may resume the witness stand, Mr. Zap.

(The witness handed Mr. Maury a document taken from his files which was then marked by the Clerk as Government's Exhibit 57 for identification.)

The Witness: I believe that Exhibit 57 for identification is supposed to be a letter of intent. Something similar. Those forms change. This one pertains to contract No. 83142. It is dated 12 March, 1941. The date of the contract is March 22, 1941, contract 83142.

I have received other letters of intent; we were at the job ahead of that letter even; I know I got a contract—. When we do get that letter, we started to proceed with more speed, or full speed, as many men as we had available under [346-a] a particular contract; or laid out the plans to proceed. This was

(Testimony of Edward F. Zap.)

true even though the contract had not been formally entered.

When I said yesterday that the letter of intent is the green signal, I meant the go ahead signal to start on it and the paper work and the signing of the contract and the negotiations of the exact terms will come through later.

I believe I got a letter of intent prior to entering into contract number 11909 in September of 1942; it seems to me I got the letter of intent about a month before I signed the contract but I am not sure of it. It is very simple to determine this from the correspondence.

(At this juncture Government's Exhibit 57 was received in evidence and passed to the jury.)

The Witness: My best recollection of how long negotiations went on before signing this contract No. 11909 are that it must have been from May of 1942 until the date of its being signed in September. The subject matter of this contract is general research to elaborate more and apply those new flaps to all types of Naval aircraft.

After I got this letter of intent pertaining to this contract, we tried to line up the work, to plan for it, but at that time we did not have many people to work; everybody was busy on the Grumman. Before receiving the letter of intent, I believe I did some planning and Mr. McLauchlin did [346-b] some planning as it was more of less at McLauch-

(Testimony of Edward F. Zap.)

lin's request to me. He helped me to work out the proposal, to generalize on the program to include the thick air foil section. I could not tell how much time Mr. McLauchlan spent on it.

Q. How much time did you spend on it?

A. Oh, off and on, a day or two days. We were busy at the time.

I am not quite sure without looking up the records whether an actual start of this project was made until after we received the letter of intent. We did try to do some work on it but other urgent matters came up.

With reference to Government's Exhibit 37 in evidence, being check No. 384 and Government's Exhibit 30, concerning the item of $500, which I testified was presented to the Navy and paid, the check is numbered "15728-A," it says here. I did not see Government's Exhibit 30 in evidence.

Q. At any rate it was referred to on page 1401 and -2 of the transcript. The question was, "No, it is dated June 29, 1942, the invoice is dated."

The answer was, "This seems to be an invoice too."

But, at any rate, what I am driving at is the $500 item.

You went to some length yesterday to explain that this charge was for work done at the wind tunnel of the University of Washington and that you had paid $500 or more out of your pocket to pay students at the University of Washington and [346-c] for other expenses.

(Testimony of Edward F. Zap.)

A. The check seemed to indicate. It says "Reimbursement."

Q. I am not asking what the check says. I am asking what your recollection is now that that item was for.

A. Yes. For reimbursement of money I spent on some of the tunnel tests, or before.

Q. Now calling your attention to this Exhibit 30, and the sheet therein entitled "Schedule C," the item on Schedule C June 29, 1942, "Electric power in wind tunnel, $500." Does that refresh your recollection at all?

A. I have never seen that paper.

Q. You never saw it before? A. No.

Q. Turning to the next page, then, there is an invoice. A. Yes.

Q. Signed by yourself, is it not?

A. That is correct. That is my signature.

Q. Yes. Turning to the next page, there is another invoice? A. That is correct.

Q. Is that signed by yourself?

A. That is my signature.

Q. The first one being "Traveling expenses, Harold E. [346-d] Dale, to Washington, D. C., in the interests of contract NXs 4105," is that true?

A. Yes.

Q. That is signed by you and certified as correct. Now the next invoice is "Traveling expenses, Edward F. Zap, to Washington, D. C., in the interests of contract NXs 4105."

(Testimony of Edward F. Zap.)

The next one is "Traveling expenses of Harold E. Dale, chief engineer, and Marion Israel, chief of stress, to Washington, D. C." That is signed by yourself, too, is it not?

A. That is correct. That is my signature.

Q. And the next one is "Traveling expenses, W. M. McLauchlan and George Jue, to the University of Washington, Seattle, Washington, for the purpose of obtaining certain vital information pertaining to stress requirements under contract NXs 4105," and the total of that is $192, is it not?

A. Yes, that is correct.

Q. Yes, sir. And the next one is a charge to two round trip tickets from Los Angeles, California, to Seattle, for McLauchlan and Jue, and the total of that is $133.56, is it not? A. That is correct.

Q. Signed by you? [346-c]

A. Yes, sir, that is correct. That is my signature.

Q. The next one is "Check to Northrop Aircraft Company, for airline ticket to Washington, D. C., in the interests of contract NXs 4105," is that true?

A. That is my signature.

Q. The sum of $287.76? A. Yes, sir.

Q. The next one we come to is one dated May 8, 1942, it being an invoice which states as follows: "Reimbursement, E. F. Zap, for advance to power company for power used at University of Washington, Seattle, Washington, wind tunnel in ascertaining certain vital stress information in connection with item 1, lot 2, of contract NXs 4105." By pay-

(Testimony of Edward F. Zap.)

ing the power bill direct a substantial saving in wind tunnel charges is made. The amount is $500, certified correct and just, payment not received, "Edward F. Zap," signed. Is that your signature at the bottom? A. My signature, correct.

Q. Does that check, dated May 9, 1942, being Government's Exhibit 37, in evidence, check No. 384, refresh your recollection as being for the same charge that this voucher dated June 29, 1942, is for?

A. The description of both exhibits don't jibe. That is what I notice first. Here it says, "Reimbursement on tunnel test design information, job 252," on account $500," [346-f] It is dated May 9th. And here this says May 8th, and just as you read.

Q. Can you now tell us whether or not those two items are for the same charge? The check and the invoice?

A. I only can go on account of this date. It says "Reimbursement," so I am construing I was before that up at the wind tunnel and did some work up there.

Q. In connection with that item, Mr. Zap, do you remember last June, approximately June 15, 1942, having a conversation at your place of business with Mr. Hilton J. Byars and Mr. L. S. Minor concerning those specific charges?

A. Might be, but I can't recollect. I had several discussions.

(Testimony of Edward F. Zap.)

Q. Is it not true that you had such a discussion on or about June 15, 1942, at your office——

A. I can't recall.

Q. ——in West Los Angeles, California?

A. I can't recall if it was the 15th of June. I couldn't recollect.

Q. Approximately.

A. It might be, but I don't recollect.

Q. Your testimony is that you do not recollect?

A. Oh, I have seen Mr. Minor in my office probably as a total—I can't recollect taking the time in November, last [346-g] year, when business was regular—probably three times in my office. That is all I recollect. He might have been there when I was not there.

Q. Do you remember?

A. I saw Lieutenant Minor several times in his office.

Q. Yes. And did you see Mr. Hilton Byars there about that time?

A. I saw Mr. Hilton Byars there probably almost every week, to my recollection.

Q. Do you remember or do you not remember having a discussion with them concerning this particular $500 item? A. Not that I recollect.

Q. Now, is it not true, Mr. Zap, that on or about the 18th day of June, 1942, at your office in West Los Angeles, California, you personally stated to Hilton J. Byars that you had paid the power company the sum of $500 for power used in the wind tunnel tests at the University of Washington?

(Testimony of Edward F. Zap.)

A. I know now what you are referring to. May I explain?

The Court: Yes.

Q. By Mr. Maury: Please answer the question first. Is it true or is if not true that you had such a conversation and made such a statement?

A. No, I did not make such a statement.

Q. You did not make such a statement?

A. No, it was different. [346-h]

Q. So you wish to explain? A. Yes.

Q. Please explain.

A. I would like to make that statement as I explained.

Q. Well, explain.

A. Yes. I have always difficulty to talk to anyone which is not from our profession, aerodynamicists. Like the counsel, Mr. Binns, said, he had to have 50 times explained what the flap is, and he still don't understand it. So the same difficulty with Navy accountants, and my own accountant, to explain a tunnel procedure. I gave an explanation as I tried to explain it yesterday, what we did in the tunnel, and here is the result. On the check it says "Reimbursement on tunnel tests for design."

Q. I am not asking you what it says.

A. The bill says something else.

Q. Just a moment, Mr. Zap. I am not asking what it says. A. The bill says something else.

Q. Just a moment, Mr. Zap. I am asking what

(Testimony of Edward F. Zap.)

it says on the check. I am asking your recollection of that conversation.

A. I recollect some faintly now. I explained the procedure, what we are doing in the tunnel and how we are trying to save time and power, by which we mean manpower. Of course, [346-i] electric we call juice.

Q. Did you tell Mr. Hilton J. Byars that you meant manpower when you said "power"?

A. Well, Mister—no such thing.

Q. Did you tell him that at that time?

A. We told——

Mr. Lavine: Read the question back please. I don't think he——

(The question was read as follows: "Did you tell Mr. Hilton J. Byars that you meant manpower when you said 'power'?") [346-j]

The Witness: That is correct. That is what we mean.

Q. By Mr. Maury: Did you tell him so?

A. I can't recollect.

Q. You can't recollect. Now, is it not true, Mr. Zap, that you stated to Hilton J. Byars at that time and place that you had paid this money direct to the power company, I mean the $500, in order to effect a substantial saving in the charges made by the power company? A. No such thing.

Q. You made no such statement? A. No.

Q. Is it true or is it not true that you stated that if the University of Washington would bill for the

(Testimony of Edward F. Zap.)

power used, it would be at a higher rate to you than if the power company were paid direct?

A. That's a mixed up statement of a statement I made and explained the situation just like in those checks. I can show you what Mr. Byars or Mr. Minor writes on those things. It is "float struts" one day, and comes back——

The Court: Wait a minute now.

Q. By Mr. Maury: Now, can you show us what Mr. Byars or Lieutenant Minor wrote on those checks or papers?

The Witness: What is that?

The Court: Read the question.

(The question was read.)

The Witness: On what checks or papers?

[346-k]

Q. By Mr. Maury: I don't know. You just stated that you could show us what they wrote on checks and papers, and I am asking you.

A. Oh, yes. I can show you.

Q. Fine.

A. This is Mr. Byars'. This is one sample I found of them.

Q. What is that? Just have a seat.

A. It is a float strut. It is a strut——

Q. Just a minute, Mr. Zap, until we identify this.

The Clerk: You want that as Government's exhibit?

Mr. Maury: Next in order.

(Testimony of Edward F. Zap.)

The Clerk: That will be Government's Exhibit 58, for identification.

(The document referred to was marked as Government's Exhibit No. 58, for identification.)

Q. By Mr. Maury: Calling your attention to Government's Exhibit 58, for identification, Mr. Zap, is that one of the sheets that Mr. Byars made out? A. That is what it is.

Q. Is that one of those C.A.S. 5 or 5-A forms?

A. Yes. Signed by Mr. Hilton Byars. Correct.

Q. Yes, sir. Let me see it. Was this particular——

A. Submitted originally "struts". Then it is "street".

Q. One of these is not a carbon copy of the other. By "strut" or "street" what do you mean?

A. A strut is a strut. [346-1]

Q. Well, that is what is typewritten in here, "floating struts."

A. But submitted as "floating street."

Q. Yes.

A. And came back as a "floating stress."

Q. Yes. It came back from where?

A. And there are many of those things.

Q. You say Mr. Hilton Byars had a discussion with you about this $500 item and made out one of these? A. What was the question now?

Mr. Maury: Repeat the question, Mr. Reporter.

(The question was read.)

(Testimony of Edward F. Zap.)

The Witness: I don't recollect if he made one out. I usually didn't see those things. I never saw a C-4 or C-5's form. I dug them up in the last week. I only saw the invoice coming to me, that is all.

Q. By Mr. Maury: You saw the invoice. Did you read it before you signed it?

A. No; because I know it has been prepared by our staff, it was checked by the Navy auditors, and this is just a matter of a form. I glance at that, $500, wind tunnel test, sign it and there it goes. It has been checked by almost six or nine auditors, so I had to assume it's correct.

Q. Isn't it true, Mr. Zap, Mr. Byars questioned that item and had that conversation with you concerning it which I have described? [346-m]

A. Mr. Byars sitting out there?

Q. Yes, sir.

A. I don't recall that. Just the reverse. I asked Mr. Byars every time I saw him, in my place, "Mr. Byars, is everything in order?"

Q. Now, just let us get down to earth. Did you or did you not have this conversation with Mr. Hilton Byars on or about the 15th of June, 1942, concerning the $500 item which is before you?

A. I can't recollect.

Q. I see. Calling your attention now to Government's Exhibit 8 in evidence, a letter from the University of Washington, did you receive that letter?

The Court: What is the date?

(Testimony of Edward F. Zap.)

Mr. Maury: The date of the letter is August 25, 1942.

The Witness: Yes, I have seen that letter.

Q. By Mr. Maury: Does it refresh your recollection at all in connection with the trip of July 15th, or thereabouts?

A. Apparently that states here the report number——

The Court: Just a minute. Just does that refresh in any way your recollection now in connection with the check for $1,000, Government's Exhibit 37? That is the only question.

The Witness: I think so, if I am allowed to look a little closer.

The Court: That is right. Take all the time you want. [346-n]

The Witness: Report 178, 183, 188, 189, 190. It is very simple to check up. We have copies of those reports. If I don't have them here, then Commander Smith has them. And that shows clearly what has been done and where it belongs to. To designate from that report or from my memory as to which report belongs to which job, most of it here, roughly almost everything, belongs to the Grumman.

Q. By Mr. Maury: Calling your attention to Government's Exhibit 58, for identification, Mr. Zap, is that one of the sheets that Mr. Byars made out? A. That is what it is.

Q. Is that one of those C.A.S. 5 or 5-A forms?

A. Yes. Signed by Mr. Hilton Byars. Correct.

(Testimony of Edward F. Zap.)

Q. Yes, sir. Let me see it. Was this particular——

A. Submitted originally "struts." Then it is "streets." [346-o].

As to report 154-B, without seeing the report, I don't know what it contains. Those pencil figures in the margin of Exhibit 8 are in my handwriting. Opposite the report 154-B, on the righthand side, those figures 082U designate, as I want to explain, that I have not seen that letter until somewhere around when we flight tested, which would be late in September, and those notations are the beginning of allocating the time to the various jobs. Those are my notations on it; it then goes up in the aerodynamics department; McLauchlan digs up the reports, and Mr. Bowers, his assistant, and checks these things, and he sends that back to me and verifies if those reports fit in these notations I am putting on here. And that was never finished. You see, I never got that back, because then the cyclone came and destroyed all these things.

It was my idea at the time I saw that the pencil figures in the righthand margin 082U after report No. 154-B, would signify that this work indicated under that report was then on the 0821. I sent it as a question mark up to the aerodynamics department to give me a complete report on it.

The letters 08 in the margin opposite report No. 173 also mean 082U. The same is true as to the pencil letters 0.8 as to report 177.

(Testimony of Edward F. Zap.)

As to report 178, the letters GR in the righthand margin indicate Grumman or contract NXs 4105. The letters [346-p] GR on the righthand side as to 183 also indicate Grumman.

I want to state before I checked up those things it was my attorney at the time it belongs to the Grumman, because around that time this tunnel test was, also roughly stating, mostly done in July, as page 2 of the Exhibit indicates May and July. It was my idea when I made these pencil notations that everything on page 2 pertained to the Grumman which is contract NXs 4105. I want it understood it was a suggestion of me to the aerodynamics department to check up and give me a report on it.

I believe I have seen Government's Exhibit 16 in evidence before because that is my handwriting on the bottom of the second page, or the carbon copy.

I don't remember what the figures "3-0" at the top of the column to the left in my handwriting mean.

This 26-0 seems to be the general account. I am not sure. It seems to be the allocation account or something. I had a meeting about it with somebody: with Champlin, probably, or with McLauchlain: it might have been with Browne. Rather Browne, because it was Browne's job to enter these things and pay—and wheedle it out with Champlin. I would

(Testimony of Edward F. Zap.)

not say that these were my directions to him how to enter the figures.

Q. What were they then?

A. The same indicates here. He talked about it [346-q] probably. He asked me "Can you remember this?" and I always had trouble with those bills. They sent me bills after half a year and we couldn't untangle the situation, which is which. In the correspondence I can show you we had continuously a squabble with the University: "break these things up, each report with the date on it, and how much it cost."

I believe, again guessing, you can trace back in the correspondence file of the wind tunnel that we wrote back "break that bill up." Let's see the date. August 28th. It looks like this came first and this came second, according to the date.

I do not recollect whether I made the apparent erasure in the left hand margin of Exhibit 8, next to the column designated "Report No. 177."

Q. Can you look at the figures?

A. I haven't seen these things since it was taken away from me.

Q. Surely, surely. Can you look at the figures that are apparently erased and tell whether they were made by you?

A. I can't see that very good. Can you tell me what it means?

Q. I am asking you, Mr. Zap.

(Testimony of Edward F. Zap.)

A. I can't see these things very clear. I can't make that out.

Q. You can't make it out? A. No. [346-1]

Q. I observe also that there are erasures on the other document, right in the center of the page here. Can you make these out?

A. I can make out one 5. That seems to be a pencil erasure.

Q. Yes.

A. I can make out a 5 here, then a 6. This other one is just floating all over the place.

Q. Well, let us go back to the other exhibit now, the longer letter, that is 8, in evidence. Calling your attention to these pencil notations in the left hand margin, are those in your handwriting also?

A. Yes, they are in my handwriting.

Q. Mr. Zap, did you ever pay the Puget Sound Light Company any money whatsoever on account of power used at the wind tunnel of the University of Washington?

A. I did not ever pay any power company in Seattle, Washington, any sum of money whatsoever on account of power used at the wind tunnel of the University of Washington, except that on a few occasions when we wanted to work at night, it was necessary to pay extra to have a "standby man" on at the power company in order to sell us the power peak when it was available. This was still charged to the University and we still paid it later on, but that was, I may say, "black market" so to speak.

[346-2]

(Testimony of Edward F. Zap.)

Q. You short-circuited the University then, to the tune of about ten or twenty dollars?

A. That's right, but this money was not paid to the power company, or to any power company to my recollection at any time.

The Witness: I heard Mr. Dwinnell testify a week or so ago; I met him every time I was up at the University of Washington.

Q. Do you remember the conversation he testified to in which you were said to have asked him for certain letterheads of the University of Washington in blank?

A. There were no letterheads.

Q. Do you remember the conversation?

A. Not very clearly. I remember something, asking him to split up reports, because they gave us two or three reports in one report form, and that wasn't useable to us, because we couldn't send it in to the Navy that way, because some of the work was done on one airplane, other work on another airplane, the third work was a general report to the aerodynamic department of the Bureau. It has to be broken up in each individual report.

Q. Well, do you or do you not remember at the University of Washington you asking Mr. Dwinnell for some blank letterheads of the University of Washington?

A. No, I don't remember. What should I do with [346-1] letterheads?

(Testimony of Edward F. Zap.)

Q. I ask that that be left to the jury and stricken from the record, your Honor.

The Court: We cannot both leave it to the jury and strike it from the record. Let it be just one or the other.

Mr. Lavine: I submit we should leave it to the jury.

The Witness: I don't remember in that conversation that I told Mr. Dwinnell that some of those projects were my own private work; that is a misunderstanding. I can clear that up. I do remember a conversation concerning splitting up these reports faintly, because we had that trouble. To explain a little bit on that, you see if you check up on those various reports, on the dates, you will find we were in the wind tunnel, say in February; the report from the wind tunnel came in May or June. That is not satisfactory. So if you further check up you will find gradually we took the reporting over by ourselves, in order to get reports faster. And that's all I can recollect.

By the Witness: I heard Mr. Magill testify this morning that the fee I was to pay Mr. McAvoy for the flight test was approximately $2500. The exact amount Mr. McAvoy and I agreed on for those flight tests—again I must say I don't recall correctly. It is only what I faintly recollect. Basically what was agreed on is that the Government test is run by McAvoy for $2,000 or $2,075, which is the [346-u] standard Navy test, and any addition to it has to be

(Testimony of Edward F. Zap.)

paid extra; of course, all expenses included, his insurance included, and so on.

Referring to this, in lieu of Exhibit 3, namely the letter of January 29, 1942, this is over my signature and it is addressed to the resident inspector of Naval aircraft.

Mr. Magill *and figured* out those figures before we put them down. My recollection is we figured it out, with Mr. Magill, and Mr. Harold Dale was involved in that too, because I checked it up last week, and you see there is H. D., Harold Dale, and L. H., which means Leona Hanley has written the letter. So from that I conclude that Harold Dale dictated [346-v] that letter and Mrs. Leona Hanley wrote the letter, and I signed it. This is a proposal, and I go a little closer than before I send it in, naturally, yes. This is a proposal to the Bureau.

At that time I knew that I had agreed with Mr. McAvoy to pay his about $2,000 or $2,500. I don't recollect how much I planned to pay for insurance at that time. I know that from a previous flight test it runs about $1,000 to $1,500. It is flexible from one year to another one. It depends upon which underwriter you touch or you ask for and how he figures back in New York, and what kind of a quotation he gives you; how much you tell him has to be flown. That is very flexible.

Q. When you quoted to the Government, Item A, "Chief Test Pilot's fee and insurance," what insurance did that include?

(Testimony of Edward F. Zap.)

The Witness: All that insurance. May I explain this thing? In Item A in this exhibit, entitled "Chief test pilot's fee and insurance," I included or contemplated all insurance which is on my side, to protect myself and my employees, in case the airplane crashes in the field or falls on top of a house and I have to rebuild the house.

Now, in item B where it is listed "flight engineer's fee and insurance, $650," that insurance is for the flight engineer. I want to call attention that is a special insurance, because he takes a hazard in the first flights. [347]. The test pilot takes a hazard. I bought his insurance. I contemplated his insurance in this item A. Other insurance I contemplated in item A are six types of insurance. If it is the ground coverage for my protection, then it is not—no—then it is in the thing. If government ground protection, then it is not.

Q. And is the public liability and property damage insurance included in this item A?

The Witness: My own public liability, not the Government's public liability for my using their plane—but my own public liability and property damage insurance—that it belongs in that group, in my opinion—in item A.

Q. Now crash insurance, you say, was discontinued after Pearl Harbor?

A. To my best recollection I think there were two insurances discontinued. It is all in the correspondence.

Q. Was that included in item A also?

(Testimony of Edward F. Zap.)

A. Distinctly I remember the crash insurance was cancelled. There is an item G, crash insurance. I am quite sure this is a government protection, and that was cancelled. It says here "H. Ground coverage insurance, 30 days." I don't know right now if this is just government insurance or mine.

You see, all these matters, Mr. Champlin is supposed to attend to, and had all the correspondence for it.

Mr. Maury: I am talking now about that exhibit [348] before you, the quotation to the Government for the flight test, and I am asking you for your explanation as to those items other than item A wherein insurance is mentioned as part of the quotation.

The Witness: It says here "G. Crash insurance," which was cancelled. The amount of that crash insurance is $4,200. Mr. Magill and I, all three worked out, and that I sent to the Government. As I recollect, we got an answer to that letter very, very late, I believe. I haven't seen it, or maybe I glanced at it. I don't recollect correctly. I know for months we didn't get any answer.

This morning, I testified concerning certain expenses for insurance. The liability insurance in my business for injuries to employees is contemplated in that statement before me.

In my opinion that belongs in the pilot's fee and insurance. That is my protection when somebody gets hurt by a propeller, one of the employees work-

(Testimony of Edward F. Zap.)

ing around an airplane, and I have got to be protected.

Q. Now, is "workmen's compensation on all employees unless flying" included in that item A or any other item?

A. Well, I don't know. You see, these insurance matters, they were cooked out—I cannot make a statement where this thing belongs to. I don't dare to make any statement. I don't know much about that matter.

Q. You testified this morning that on August 27, 1942, [349] you took out an Aetna accident policy upon Mr. Dale while flying, and that the cost of it was $250. Is that included in item A there?

A. There were two insurances taken out for Mr. Dale.

Q. Now please answer that question. Is it or is it not included in item A?

The Witness: Will you read that question once more?

(The question was read.)

The Witness: I don't think so. May I explain?

Q. By Mr. Maury: You testified this morning that you took out a $10,000 policy on McAvoy, and that the cost of it was $135 for ten hours. Is that included in the item A? A. That is correct.

Q. Now you testified this morning that on August 25, 1942, you took out a workmen's compensation on aircraft employees in flying, at a cost of $251. Is that included in that item?

(Testimony of Edward F. Zap.)

A. I am a little vague on this workmen's compensation but I believe it belongs in that.

Q. In item A? A. In item A.

Q. Now you testified this morning that on August 25, 1942, there was a rider issued concerning crash insurance, which was later cancelled, that this was government insurance. Was that included in item A?

A. If it refers to the crash insurance, item G, it is [349-a] not. The best as I remember, it was cancelled.

Q. Now you testified this morning that on August 20, 1942, you took out a comprehensive insurance policy on airplane QS2U in the sum of $80,000, that the policy was for ground coverage only, and that the premium was $560. Was that included in item A? A. I think so.

Q. You testified this morning that you had also taken out a public liability and property damage policy protecting the public against your liability to the extent of $100,000 and $50,000 for property damage. Was that included in that item A?

A. I think so.

The Witness: In other words, then, in item A, which reads $4,000, all insurance was covered except the insurance on Dale and the crash insurance. And that was my estimate of the cost of the insurance plus the test pilot's fee as of the date which that quotation bears, plus the expenses for the pilot, to bring him to the place and get him back, plus his expenses, hotels and meals and incidentals.

(Testimony of Edward F. Zap.)

I paid Mr. McAvoy altogether for his services, $2,075 in a check, $300 cash, $200 in a check, and I believe $50 in petty cash. I can't recollect clearly whether those checks were drawn on my business account or my personal account. [349-b] I believe I wrote them on my personal account.

I am not sure that this check No. 2679 to William H. McAvoy, in the sum of $4,000, being Government's Exhibit 7, in evidence, is the check that I used to pay Mr. McAvoy, but I believe I paid that on a Bank of America check. I can't recollect what I wrote. It was very exciting times, and I can't—Mr. McAvoy just signed that check, endorsed it, and that's all he did with it—you see—for your own record.

Calling my attention to Government's Exhibit 19 in evidence, and to the last page thereof, the signature looks like mine.

Q. Did you write it?

A. It looks like my signature, so I must have, but I want to call attention it looks strange to me, that paper.

Q. That paper looks strange?

A. This paper is what we're using in the stress reports. That is not our standard paper which we use for any kind of work.

Q. But it did come from your office.

Calling your attention to the document next before that in the same exhibit, is that your signature? A. This is my signature.

(Testimony of Edward F. Zap.)

Q. Calling your attention to the document next before that, is that your signature?

A. Yes, this is my signature.

Q. And to the back of the document next before that, [350] are those your signatures in two places?

A. Those are my signatures.

Q. Calling your attention to the front of the document, is that your signature?

A. Yes, this is my signature. May I see that? This is definitely paper we use in the stress department.

Q. That is indicating the last sheet in the exhibit?

A. The last sheet. Which I usually, when I go on a trip, sign ahead of time for the stress department to fill its reports and send anything back to Washington.

Q. Do you wish to testify now that you did so sign that before it was filled in?

A. There is another thing that appears to me, October 13th. Any certification I made in the middle of summer was notarized by a notary public. We established a notary public right in our office. And that is missing on the document.

Q. But do you wish to testify that you did or did not sign it before it was typed in?

A. Well, I merely report the facts as they appear to me.

Q. Yes.

A. It looks like my signature, and I suspect that

(Testimony of Edward F. Zap.)

that signature was put on that paper for the stress department and somebody has used that paper.

Q. You suspect that? A. I suspect it. [351]

Q. Now that is your testimony.

Now calling your attention to this document immediately prior to that one, what is your testimony concerning that? The invoice to the Navy?

A. That is my signature; a standard invoice which was given to me for signature, and I signed.

Q. A standard invoice? A. Yes.

Q. On the date on which it bears?

A. What was that?

Q. On the date on which it bears, October 16, 1942? A. October 16, that is correct.

Q. How much did you expend on McAvoy's expenses while at Daggett?

The Witness: Will you read that to me please?

(The question was read.)

The Witness: The Daggett trip was a special thing which was arranged on account of weather conditions.

Q. By Mr. Maury: Now just let us go back and get down to earth.

A. All right.

Q. How much money did you spend on Mr. McAvoy's expenses while at Daggett?

A. I can't recollect how much. Everybody up there was on my private money.

Q. On your private money? [352]

A. That is right, and I paid the hotel bills. I

(Testimony of Edward F. Zap.)

paid the meals, I paid everything. I bought straw hats. I even brought a doctor there because they were sick.

Q. But you don't recollect how much Mr. McAvoy's hotel bill was?

A. I can't recollect.

Q. Did you have anyone there to keep accounts?

A. In charge was Harold Dale, and we had a bulletin which designated each number, what kind of a duty he has; timekeeper, weight keeper, and so on; and it was their duty to keep track of how many men are up there and how long they are up there. Besides the time cards were down at the office and it was noted, or supposed to be noted on where they are.

Q. I see. Was anyone designated to keep track of the expenses there?

A. That was Mr. Harold Dale's duty.

Q. Mr. Dale's duty. Did he handle any money?

A. I mean for the time when he was up there.

Q. Oh, for the time?

A. Because he selected the people.

Q. Was anybody designated to keep track of the actual money that was spent and what it went for?

A. The money I spent.

Q. Did you keep track of it?

A. The best I could [352-a]

Q. Did you make any written memorandum of what you spent and on what?

A. We did a little. I got to explain the circumstances.

(Testimony of Edward F. Zap.)

Q. Please do.

A. We had been up there in the camp of Douglas, there is a mess hall up there and we received meal tickets from the Douglas, which was charged to me when we ate at the field up there. Evenings when we came in we'd eat at the hotel, and that was charged to me. Incidentals and so on I just paid out of my pocket. That is all I can recollect.

Q. But kept no accurate account of it?

A. No, I was too busy.

Q. How much were you repaid by the Government for that trip, if you recollect?

A. I saw it last week here.

Q. Anyway in that was a certificate for McAvoy's expenses, was there not?

A. If you show me the document—it probably was.

Q. Here is a document which you testified you signed, which is Government's Exhibit 19 in evidence. A. Yes, that is correct—McAvoy.

Q. You received that money for McAvoy's expenses? A. That is correct. That is correct.

Q. That is over and above the $4,300 which you received by virtue of public voucher No. 36062 in the same [352-b] exhibit?

A. That is correct. That is the expenses we paid in Daggett. It is McAvoy's—was in the total sum—it is in the report, I think, 21 or 25 days, or something like that, and 10 days we spent up there. It

(Testimony of Edward F. Zap.)

was a special assignment. The Bureau sent us up there.

Q. And it was under this letter, Exhibit 3, which is a duplicate of 49 for identification, the letter of January 9, 1942, was it not?

A. No, I feel like this was something in addition: the Government told us to go up there; it was not anticipated, it was extra, and I feel like I am entitled to be paid extra for time.

Q. Was it flight testing a Vought-Sikorski plane on this trip? I withdraw that. On this trip to Daggett you did test a Vought-Sikorski plane in flight test, did you not? A. That is correct.

Q. And William H. McAvoy performed the flight test? A. That is correct.

Q. In accordance with regulations?

A. That is correct.

Q. Mr. Dale accompanied him as engineer?

A. That is correct.

Q. Then did, or did not, this trip to Daggett follow as the result of the letter of January 29, 1942? [352-c]

A. I didn't get the meaning of the whole question. Will you repeat it?

Mr. Maury: Read him the question, Mr. Reporter.

(The question was read.)

The Witness: No, it did not. It was not contemplated.

Q. By Mr. Maury: When you say you think

(Testimony of Edward F. Zap.)

this flight test was something extra, what do you mean, please?

A. When we made the estimate of that price, why, we anticipated going to fly it in the Los Angeles area, and it says so in the letter. No, I am in error. It must have been another letter—Los Angeles area—because if we are sent somewhere else that is extra.

Q. Then the $1260 was the extra over and above the amount set forth in that letter, is that true?

A. Pardon me. Here I am correct again. It says here, "tests outlined in Enclosure (A) will involve approximately 15-20 flight testing hours in Los Angeles area."

Q. Then the $1260 was additional, over and above?

A. That is what I am entitled to because I was sent up there 180 miles away; we had to get trucks, and trailer equipment and everything had to be transported up there.

Q. Did you discuss that——

A. We actually spent 12 days up there and had to go up.

Q. Just a moment. Did you discuss with Naval officers [352-d] or officials before you went?

A. I was ordered to do that.

Q. Who ordered you?

A. From the Bureau came an order, "move to Daggett Field."

Q. Now, the whole flight test then was the result

(Testimony of Edward F. Zap.)

of this letter of January 29, 1942, with the additional fact that you were ordered to move to Daggett Field because of weather conditions at Hughes Field? A. That is correct.

Q. Did you receive an answer to that letter of January 29, 1942?

A. I think there was one; I don't recall it.

Q. I call your attention to Government's Exhibit 3 in evidence, being a letter dated June 29, 1942. Can you tell us whether that is, or is not, the answer to the letter of January, 1942?

Mr. Lavine: I object to that, the letter is the best evidence.

The Court: Yes, the letter speaks for itself.

The Witness: That is what it says here. [352-c]

Q. By Mr. Maury: That is what it says there? Did you receive that letter?

A. I am looking at my initials. Mostly what I read I initial. It doesn't seem to have my initials.

Q. Did you or did you not receive a letter dated June 29, 1942?

The Witness: I think so. The office probably received that, and that's all. The duty is when such things come in it is attached to it, and it was the duty of Harry Champlin to keep track of it, and go through the whole thing and watch the procedure. Mr. Champlin and Mr. Browne's duty is to inform us and comb these things before it is turned over with the Navy, in case there is a question to confer

(Testimony of Edward F. Zap.)

with the Navy auditing people and cook the situation out.

You must realize we are finishing our own baby, and we were having letters, everybody watching it, finishing, we received telegrams daily, "When do you fly? What is the date," everybody watching the birth of that new baby. So we went through the whole procedure as Navy specifications prescribe it. I didn't wait for any letters. We were anxious to get it out to the field, and the moment it was finished, that work—I believe the last day before we got it out we worked two or three nights throughout. I was myself there in the factory, stayed at night time there to get it out; we pulled that airplane out almost somewhere [353] around 4:00 o'clock in the morning to Hughes Field. The pilots all were prearranged, we just wanted it to fly, and it is up to the naval inspector because there are certain requirements before you can fly, some kind of a report, a balance report, has to be handed to the Navy inspector before we are released to take the airplane over and fly with it.

Originally in the contract 83142 there was no provision for a flight test.

Q. By Mr. Maury: Mr. Zap, in the claim against the Government for $4300, did you include the $200 for Harold Dale to fly back to Anacosta?

A. In the $4300?

Q. Yes, sir.

A. Please, I want to mention there are two

(Testimony of Edward F. Zap.)

claims, four thousand and three hundred extra. And the $200 for Mr. Dale to fly to Anacosta is included in this four thousand.

Q. In the four-thousand? A. Yes, sir.

Q Is it set forth anywhere in that claim?

A. Chief test pilot fee and insurance. You see, McAvoy left and Dale had to continue flying test flights. We still test flight that airplane to Anacosta. The Navy was anxious to get that airplane back to Anacosta and us to continue making changes.

[353-a]

Q. Now, calling your attention to this Government's Exhibit 19 in evidence, which contains Voucher No. 26062, is that the claim for $4300?

A. Yes, it says so here.

Q. Yes. A. $4300.

Q. That is backed up by the invoice for $4300?

A. Correct.

Q. And the statement of $4000 has been paid to William McAvoy? A. Yes, it says here so.

This isn't necessary, in my opinion, at all. (Referring [353-b] to the last sheet.)

Q. That is the last sheet?

A. That last sheet is not necessary. Some mystery to me why that sheet is in there at all.

Q. Calling your attention to this invoice, that is the one for $4300, is it?

A. Yes, it says, "As per list Z-73. 4300," because I looked it up. When you look at the list Z-73 you

(Testimony of Edward F. Zap.)

find there is 4300 for extra flights, that means according to——

Q. Where is that list Z-73?

A. You must have that.

Q. You looked it up.

A. Oh, wait a minute. I can get it?

Q. Please do.

(Witness leaves the stand.)

A. That particular list is missing in here.

Q. In your papers?

A. Yes, sir. This is what I received last week. It is not in my papers.

The Court: Take the stand.

Q. By Mr. Maury: When did you look up list Z-73?

A. I am a little confused now. I don't know if I ever seen it, or did I see it? I don't know now.

Q. You mentioned a moment ago seeing it. Let's get the matter quite straight. You think back and tell us what your recollection is concerning this Z-73. [354]

A. I probably have been concluding myself I have seen somewhere two figures, 4300, and I believe I have just constructed that it is probably in that list.

Q. Calling your attention, Mr. Zap, to Government's Exhibit 5 and 6 in evidence, do these refresh your recollection at all as to the two separate figures of four thousand dollars and three hundred, which you just mentioned?

(Testimony of Edward F. Zap.)

A. Well, let me examine for a minute what it relates to. This is written by Mr. McAvoy. That is in his handwriting.

Q. Surely. I will hand it to you.

A. I believe so.

Q. Yes.

A. I can't recollect the things. This is my signature on it.

Q. That has your signature on it?

A. Here, yes.

Q. What are the figures 3-15 beside your signature? Is that in your handwriting, those figures?

A. It looks like my handwriting.

Q. What does it indicate?

A. Flight test 3-15.

Q. What does the 3-15 mean?

A. As I recall the second detached here means various items in the contract, Item 1, Item 2, Item 3, and so on down the line. [355]

Q. 15 items? And what does that pertain to?

A. It must refer to flight tests.

Q. 3-15 refers to flight tests? You mean on the books of your concern? Is that the account number?

A. Probably that is what it is.

Q. Do you know, of your own knowledge, whether the account number of the flight test under 83142 was designated 3-15 on the books of the Zap Aeronautical Engineers?

A. I am not sure about that.

(Testimony of Edward F. Zap.)

I don't know any of the account numbers. There were hundreds of account numbers on my books.

I cannot tell you what account number 215 was. I cannot tell you what account number 252 was. I couldn't say what account number 262 was. I cannot tell what account number 263 was. I only recollect those 26's meant Grumman. They were Grummans.

Q. How about the 3's?

A. The 3's, OS, 83142, in the beginning has a 3 on it.

Q. And 3-15 was the flight test? A. Yes.

Q. Was that the lowest or the largest number of the accounts on the Vought-Sikorski?

A. I don't get the question.

Q. Was that the largest numerical number of the accounts [356] pertaining to the Vought-Sikorski?

A. I couldn't tell for sure.

Q. Can you tell by examining the books?

A. In these books here?

Q. Yes.

A. I don't know anything about those books.

Q. You don't know anything about those books?

A. No.

I cannot tell anything by examining the books. I don't know anything about those books. I saw them laying around and growing and adding to it. I sat at the safe where they were taken out daily and put in there. Miss Boyle and Mr. Browne and Mr. Champlin put them in there. I never looked inside the books to my recollection. I asked for statements of the condition of my concern. I got statements from Mr. Browne, the certified public accountant; he made

(Testimony of Edward F. Zap.)

monthly statements, and that is the one I looked at.

I watched Mr. Champlin's and Mr. Hanley's time cards. And there was one more fellow there was under suspicion. [356-a] I can't—just a minute—yes, it is one more employee—Lewis Strauss, was in my mind under suspicion of cheating time.

The Clerk: This is VV into evidence.

(The document referred to was received in evidence and marked DEFENDANT'S EXHIBIT VV.)

Mr. Lavine:

"Request flight tests Zap OS2U be made as previously outlined and approved."

And then the next letter, it is a request letter and reads as follows:

"Contract 83142. Request this office be advised of valuation to be placed on OS2U-2 Serial 3075 in order that contractor may insure airplane for crash."

Then follows a cancellation of the crash insurance, public liability and property damage will be maintained by contractor.

"Your 15 KOS airplane has not flown. Weather permitting first flight will be made Saturday, 19 September."

"Contract 83142. Fault conditions this area holding up preliminary demonstration OS2U airplane. Unless advised to the contrary this

(Testimony of Edward F. Zap.)

plane will be moved to desert field at Daggett, California, approximately 100 miles northeast Los Angeles."

And then here is one dated September 21, 1942:

"OS2U-2 airplane moved to Highes Field zero seven [357] hundred this date. Provided weight and balance report delivered to inspector airplane will make first flight fifteen hundred this date."

And then follows a teletype from Daggett Field, on Navy teletype, dated September 30, 1942.

"OS2U-2 flight performance of 29 September, 1942. Flight No. 14—10 minutes—aileron stick for test with bunges on different mechanism. Number 15—thirteen minutes aileron stick for test with additional bunges. Number 16—twelve minutes, aileron stick for test removing bunges and adding aileron balance weights 3.4 pounds each side.

"Number 17—twenty-one minutes, rolling moment test, removing aft aileron cover plate. Number 18—nineteen minutes, aileron stick for test, removing forward aileron cover PAXX plate and setting aileron vane to 45 degrees. Number 19—seventeen minutes, aileron stick for test with addition of holes in upper surface of aileron."

And then the document goes on with a number of other technical reports signed "Carlin."

(Testimony of Edward F. Zap.)

The Witness: In connection with the other items of the flight test, outside of this $4,300, I have not received any payment from the United States Navy, to my recollection. I am speaking of payment of fees now. I have not received any payment fees in connection with the—I am sure, outside of [358] the $1909 I have testified to here by some auditor, I have not received any payment of any fees for that; the balance of the expenses for the work in the wind tunnel at the University of Washington. I don't think so, and I am doubting that I received the $1900. It has been audited, probably a voucher written out, but I did not receive the money. I am quite sure.

MURRAY B. MYERSON,

recalled as a witness on behalf of the plaintiff in rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Binns:

I am a Special Agent of the F.B.I., Los Angeles. I am an accountant and have been about 20 years.

Q. Mr. Myerson, can you come down here and look at the books and records of Mr. Edward F. Zap in the account entitled 3-15 and tell us if that account indicates that any sums of money were given to Harold E. Dale for expenses?

(Testimony of Murray B. Myerson.)

The Court: I suppose you mean "paid," and not "Given."

The Witness: Exhibit No. 41, on page 1 of account No. 3-15, shows an entry opposite the date September 8th, "Harold E. Dale, flight test," under "direct charges"; and under the sub-heading of "other charges," "$250." [359]

Q. By Mr. Binns: Will you trace that check into the check register, please, Mr. Myerson?

A. Yes, sir. The check register, Exhibit 38, for identification, shows the entry, on page CR 55, under the date September 8th, check No. 2601, in the amount of $250, payable to Harold E. Dale; and under the "distribution" column, charged to account No. 3-15, $250.

Q. Will you give me the date of that check again, Mr. Myerson?

A. The entry appears under date of September 8th.

Q. Now, then, can you discover, Mr. Myerson, any other checks given to Mr. Dale for expenses?

A. In Exhibit 38 for identification, on page CR 58, and under date of October 9th, a $200 item, payable to H. E. Dale; charged on the distribution side to account 3-15. In that account 3-15, in Government's Exhibit 41, page 1, under date of October 9th, there is an entry to H. E. Dale, $200, charged under "direct charges," and the sub-heading of "other charges." The number of that check is 2701. That is the check to which that entry refers.

(Testimony of Murray B. Myerson.)

Mr. Binns: I ask that this check which has been withdrawn from Government's Exhibit 37, dated October 9, 1942, in the sum of $200, drawn to Harold E. Dale, be admitted in evidence.

The Clerk: Government's Exhibit 37, into evidence.

(The document referred to was marked as Government's Exhibit No. 37, and was received in evidence.) [360]

Q. By Mr. Binns: Mr. Myerson, I show you this check No. 2741, and ask you is that check entered on the books and records of Edward F. Zap?

The Witness: Exhibit 38, for identification, on page CR 59, there is an entry of a check for $643, No. 2741, payable to Harry Kem Company, $643, and charged to account 56, which is the accounts payable account in the general ledger. Exhibit 39, under account 56, shows an entry, under date of October 31, 1942, for $6,951.12, in which the amount of $643 is included. That sum is posted from the accounts payable in invoice record, page 10, in Government's Exhibit 38, shows that on September 30, $251 was charged to account 3-1, which is the unexpired insurance account in the general ledger, in Exhibit 39; and on the same date the sum of $392 was charged to account 3-0, which is shown in Exhibit 41 as the clearance account under our contract 83142.

Mr. Lavine: To which we object under our general objections heretofore made, your Honor.

(Testimony of Murray B. Myerson.)

The Court: It is so understood.

The Clerk: That is check 2741, into evidence.

(The document referred to was marked as Government's Exhibit No. 37, and was received in evidence.)

Cross Examination

By Mr. Lavine:

Q. Mr. Myerson, you didn't give us all the items that you found in Mr. Dale's accounts, did you?

[361]

A. I didn't get through before I was asked another question.

Q. Well, as a matter of fact, there was $200 sent to Mr. Dale on October 30, 1942, wasn't there?

A. I notice an entry in the—I can't tell you whether the books indicate that. There is an entry under date of October 30th which is not complete in one of the books, although it appears to be posted under his name in another book.

(Witness excused)

Mr. Lavine: We at this time offer in evidence a receipt for $200 sent to Harold E. Dale in Washington, D. C., October 30, 1942, and $2.89, cost of wire, signed by Ethel Boyle, the bookkeeper. We offer that in evidence for the defendant.

The Court: Admitted.

The Clerk: That will be Defendant's Exhibit ZZ.

(The document referred to was marked as Defendant's Exhibit ZZ, and was received in evidence.) [362]

(The following proceedings were had outside the hearing of the jury:)

Mr. Maury: In this matter, your Honor, throughout we have endeavored to be mindful of any possible record on appeal and of the voluminousness thereof, and, if possible, probably I can omit the offer as to Exhibits 34 to 45, for identification, into evidence in themselves and in full. The record is replete with quotations therefrom.

The Court: I notice that.

Mr. Maury: And yet, in order not to prejudice the Government's position, I ask counsel for a stipulation that throughout the course of the argument either side may refer to said books and quote or state therefrom, to the same effect and to the same extent as though they were in evidence, and that they may be deemed in evidence for that purpose without putting them formally into the exhibits and without offering them in evidence.

Mr. Lavine: Well, Mr. Maury, frankly I am afraid if I enter into that stipulation I am waiving the right that I have sought so zealously to protect, because we feel that any use of any material gained or gathered out of any matters illegally searched and seized are in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

It has been my position right along that since those documents were illegally taken, that, therefore, any evidence [363] coming from them is illegal and should be suppressed. And I cannot, for the sake of convenience——

The Court: Well, you can certainly reserve that objection if the Government agrees to it.

Mr. Maury: Why, certainly, it is agreed that the objection may, of course, be reserved. I wouldn't in any wise ask counsel to stipulate away any client's rights.

The Court: If counsel agrees to the stipulation suggested by the Government it is understood that the counsel has in no way waived his right, as he has heretofore stated in the record, of the illegal search and seizure, and upon that basis that none of this evidence should be admitted.

I don't know what those in there for, but you are free to refer to them and read them.

Mr. Lavine: I have been trying to revolve this thing in my mind hurriedly here, but I don't see how I can enter into a stipulation with reservations. If the Court should overrule my objections to your use of them, then, of course, there is nothing I can do about it; but I don't see how I can do one thing in one breath and at the same time reserve the objection or the rights that I have so steadily tried to preserve here. I feel that I cannot enter into a stipulation on that.

Mr. Maury: Then if you cannot enter into a stipulation, Mr. Lavine, I will have to offer Exhibits

34 to 45, in- [364] clusive, in evidence, and put them into the record.

The Court: That is the only thing you can do. All right: Are they offered in evidence?

Mr. Maury: The Government now offers Exhibit 34, for identification, in evidence.

Mr. Lavine: To which we object on the grounds that they were illegally seized and searched, in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

Mr. Maury: Same offer as to Exhibits 35 to 45, inclusive.

Mr. Lavine: Same objections, on the grounds that they were illegally searched and seized, in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The Court: Objection overruled.

Mr. Lavine: Exception.

The Court: They are admitted in evidence.

Mr. Lavine: Exception.

(The documents heretofore marked for identification as Government's Exhibits 34 to 45, both inclusive, were received in evidence.)

Mr. Lavine: At this time the defendant Edward F. Zap renews his motions for a directed verdict on each and all of the counts of the indictment remaining.

I would really like to argue this with some seriousness [365] and great consideration, your Honor. I can probably do it now if you wish. I could possibly do it.

The Court: No, I am satisfied.

Mr. Lavine: You are satisfied?

The Court: Yes.

Mr. Lavine: As to each and every count?

The Court: Yes, that remains in the indictment.

Mr. Lavine: In the indictment.

The Court: Motion denied and exceptions allowed to the defendant Zap on each one of the counts.

[366]

Los Angeles, California, Monday, April 19, 1943.
9:00 A. M.

(The following proceedings were had outside the hearing of the jury:)

Mr. Lavine: The defendant Zap objects to two of the instructions proposed by the Government; one of which is in relation to the word "wilful"; and the other one is in relation to the "intent."

The Court: 46.

Mr. Lavine: The next instruction is the one on the presumption of "intent."

The Court: That is 47?

Mr. Lavine: Yes, your Honor. I object to that on the ground that in this case there is a specific intent required and no intent can be presumed.

The Court: No, it doesn't say that. It doesn't say intent is presumed. It says, "A person is presumed to intend natural and probable consequences of his act."

Mr. Lavine: That is right.

The Court: Those are the only two?

Mr. Lavine: That is correct. And may it be stipulated now that defendant excepts to any instructions which were tendered by the defendant and refused, for example, with the same effect as if the exception was taken after the Court finishes his instructions?

Mr. Maury: That may be read into the record but it is [367] not stipulated to.

Mr. Lavine: Then I will be required at the close of the Court's instructions to except to each of the defendant's instructions which are proffered instructions which the Court refuses?

Mr. Lavine: One other matter now, your Honor. The defendant at this time moves the Court to instruct the jury to disregard any of the books and records in the case which were introduced and admitted in evidence on last Friday, for the reason that there is no evidence connecting the defendant with the making, or entering, of any records in said books and records; and there is no knowledge shown on his part of those books and records; and for that reason they are clearly incompetent, irrelevant and immaterial as to him, and not binding on him.

The Court: The exception will be noted and allowed to defendant Zap. All right.

(The following proceedings were had within the hearing of the jury:)

(Mr. Maury made the opening argument on behalf of the Government.)

(At the conclusion of the opening argument by

Mr. Maury, the following further proceedings were had without the hear- [368] ing of the jury:)

Los Angeles, California, Monday, April 19, 1943.
2:15 P. M.

The Court: Mr. McCarty, we thank you for your services. You can now be excused. We seem to have a very healthy looking jury.

Gentlemen of the Jury, it becomes my duty, as Judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case and to consider the evidence for that purpose.

Counts Nos. 2, 6, 9, 12 and 13 will be withdrawn from your consideration. Those counts have been dismissed from the indictment.

The indictment or that part of the indictment that remains is as follows:

"The Grand Jurors of the United States of America, duly impaneled, sworn and charged in the District Court of the United States for the Southern District of California, Central Division, at the September 1942 Term of said Court, and inquiring for said District, do upon their oaths find and present as follows:

"1. At all times herein mentioned the [369] defendant Edward F. Zap was and is a resident of and was doing business within the Southern District of California, Central Division, under

the firm name and style of E. P. Zap Aeronautical Engineers."

The second paragraph deals with the defendant Lieutenant Commander Lloyd Scott. It is not necessary to read that because the Court has dismissed Lieutenant Commander Scott; and if I in any part of the indictment should read "Defendants," you will remember that it only applies to one.

"3. At all times herein mentioned the United States Navy was a duly constituted and lawful department and agency of the United States of America, and it was a lawful function and duty of the said Navy to design and test naval airplanes.

"4. The United States of America on or about the 22nd day of March, 1941, and on or about the 15th day of May, 1942, in the City of Los Angeles, State of California, did make and enter into certain contracts with the said Edward F. Zap. Said contracts designated and known as NXs 4105 and 83142 provided among other things that the said Edward F. Zap should engineer, design and build experimental aircraft and aircraft appliances for the United States Navy in consideration of the undertaking of the United States of America to compensate said Edward F. Zap by the payment of a fixed sum or sums for a certain [370] portion or portions of the work to be done and by the payment of other portions on the basis of cost plus a fixed fee to said Edward F. Zap.

"5. On or about the 23rd day of September, 1942, at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, all within the Southern District of California, Central Division, defendants Edward F. Zap did unlawfully, knowingly, wilfully, and feloniously make——"

I will read it as it is written and then you will omit the defendant Scott.

"5. On or about the 23rd day of September, 1942, at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, all within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for payment and approval to an officer in the Naval Service of the United States of Ameria a false claim upon and against the Government of the United States, well knowing the same to be false, fictitious and fraudulent, in the manner and by the means hereinafter set forth, to wit: [371]

"6. On or about the 23rd day of September, 1942, the defendants Edward F. Zap and Lloyd Scott did present to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States

naval service, a claim which falsely purported to be for reimbursement for expenses incurred pursuant to the aforementioned contract NXs 4105. Said expenses purported to be for the conducting of certain wind tunnel tests by the University of Washington, under the terms and provisions of said contracts.

"7. Defendants Edward F. Zap and Lloyd Scott well know that said claim was false and well knew that said tests had not been performed by said University of Washington pursuant to contract NXs 4105 or any other contract with the United States Navy. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States."

Count 2 has been dismissed.

"Count 3.

"12. And the Grand Jurors aforesaid upon their oaths do hereby further indict and present: All of the allegations contained in Paragraphs numbered 1, 2, 3 and 4 of Count I of this Indictment are [372] hereat realleged and incorporated by reference as if here set forth in full.

"13. Prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did un-

lawfully, knowingly, wilfully, and feloniously make and use and cause to be made and used a false bill, receipt, voucher, roll, account, claim, certificate, and affidavit knowing the same to contain fraudulent and fictitious statements and entries in a matter within the jurisdiction of a department or agency of the United States of America, namely, the United States Navy in the following manner and by the following means, to wit:

"14. Prior to the presentment of this Indictment and within one year thereof, defendants Edward F. Zap and Lloyd Scott did apportion and cause to be entered upon the books and records of said Edward F. Zap false entries of and pertaining to sums of money paid to the University of Washington for conducting wind tunnel tests in such a manner as to falsely reflect and falsely represent that said moneys had been paid pursuant to the aforesaid contract NXs 4105 [373] with the United States of America. That said entries upon said books and records were false in that said sums of money had not been paid to the University of Washington, or anyone else, for conducting said wind tunnel tests for the benefit of the United States under said contract NXs 4105, or any other contract to which the United States was a party. That said books and records of said Edward F. Zap were matters within the jurisdiction of the United States Navy, in that by the terms and

conditions of said contracts between the United States Navy and said Edward F. Zap, said books were subject to scrutiny of and inspection by said United States Navy; that defendants well knew that said books and records of Edward F. Zap were to be inspected by the United States Navy for the purpose of determining the costs incurred by said Zap in performing said contracts.

"15. Said defendants Edward F. Zap and Lloyd Scott then and there well knew that said book entries were false and that said moneys had not been expended pursuant to said contract NXs 4105, or any other contract to which the United States was a party. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States. [374]

"Count 4.

"16. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if here set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3 and 4 of Count I of this Indictment and do further present and indict:

"17. That on or about the 16th day of October, 1942, at Los Angeles, California, and at other places, to the Grand Jurors unknown, within the jurisdiction of this Court and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd

Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for payment and approval to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service, a false claim, knowing the same to be false, fictitious and fraudulent, in the following manner and by the following means, to wit:

"18. On or about the 16th day of October, 1942, defendants Edward F. Zap and Lloyd Scott did make and present a claim for $4,000 upon the United States Navy for payment by presenting same to the Disbursing [375] Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California. That said claim falsely purported to be for expenses incurred by said defendants in paying William H. McAvoy for services falsely therein set forth to have been rendered by said McAvoy as a test pilot of aeronautical equipment pursuant to the aforementioned contract 83142. That said claim was false in that the sum of money actually paid to said William H. McAvoy for said services was $2,375, and no more, and not $4,000, as therein set forth.

"19. Defendants Edward F. Zap and Lloyd Scott, well knew that in fact said William H. McAvoy had been paid by said defendants the sum of approximately $2,375, and no more, for

the said services pursuant to contract 83142 and that no other and further expenses had been incurred by said defendants for the services of said William H. McAvoy. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

"Count 5:

"20. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if here set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3 and 4 [376] of Count I of this Indictment and do further present and indict:

"21. That on or about the 23rd day of September, 1942, at Los Angeles, California, and at other places, to the Grand Jurors unknown, within the jurisdiction of this Court and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify and conceal and cover up by trick, scheme, and device, a material fact and make and cause to be made a false and fraudulent statement and representation in a matter within the jurisdiction of a department or agency of the United States, namely, the United States Navy, in the following manner and by the following means, to wit:

"22. On or about the 23rd day of Septem-

ber, 1942, defendants Edward F. Zap and Lloyd Scott did falsely state and represent to Hilton Byars, who was then and there the United States Navy Cost Inspector, that the sum of $4,000 had been paid to William H. McAvoy for acting as test pilot in conducting certain tests pursuant to said contract 83142, and did present to said Cost Inspector in support of said false statement and representation a cancelled check for $4,000 endorsed by said William H. McAvoy. That defendants had previously presented to said McAvoy [377] a check in blank and requested said McAvoy to endorse the same. That said McAvoy did so endorse the same, and thereafter the defendants filled the same in in the figure of $4,000, and thereafter the defendants presented the same to the bank upon which it was drawn for payment, and received payment thereon, and thereafter presented to said Navy Cost Inspector said check, cancelled, in the sum of $4,000 and endorsed by said William H. McAvoy, as aforesaid.

"23. Defendants Edward F. Zap and Lloyd Scott well knew that said McAvoy had been paid approximately $2,375, and no more, for conducting said test flights and that no other further sums had been incurred for and on account of said test flight expenses, and defendants Edward F. Zap and Lloyd Scott well knew

that said cancelled check for $4,000 had been endorsed by said William M. McAvoy while the said check was blank and before said figure of $4,000 had been placed thereon. All of which is contrary to the form of statute in such case made and provided and against the peace and dignity of the United States."

Count 6 is withdrawn from your consideration.

"Count 7.

"28. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allega- [378] tion and statement contained in Paragraphs 1, 2, 3 and 4 of Count I of this Indictment and do further present and indict:

"29. That on or about the 9th day of October, 1942, at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the naval service of the United States, a false claim upon and against the Government of the United States, well knowing the same to be false, fictitious, and fraudulent in the following manner and by the following means, to wit:

"30. On or about the 9th day of October, 1942, defendants Edward F. Zap and Lloyd Scott did present a false claim to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer of the United States Navy for reimbursement for expenses falsely stated thereon to have been incurred pursuant to the aforementioned contract 83142, for a trip to Daggett, California, for the purpose of making test [379] flights on a naval airplane.

"31. Defendants Edward F. Zap and Lloyd Scott well knew that said falsely claimed expenses had not been incurred or expended by them under and pursuant to said contract 83142, or any other contract to which the United States was a party; and the defendants then and there well knew that in truth and in fact said expenses were fictitious and had not been incurred or expended by them under and pursuant to any contract to which the United States was a party, or otherwise or at all. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

"Count 8.

"32. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in

Paragraphs 1, 2, 3 and 4 of Count I of this Indictment and do further present and indict:

"33. That prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify and conceal and [380] cover up by trick, scheme, and device a material fact and make a false and fraudulent statement and representation in a matter within the jurisdiction of a department and agency of the United States, namely, the United States Navy, in the following manner and by the following means, to wit:

"34. Prior to the presentment of this Indictment and within one year thereof defendants Edward F. Zap and Lloyd Scott did falsely represent to Hilton Byars, who was then the Navy Cost Inspector, that certain expenses had been incurred by said Edward F. Zap in connection with a trip to Daggett, California, pursuant to the said contract 83142 for the purpose of testing the design of an airplane and of the parts thereof.

"35. Said defendant Edward F. Zap and Lloyd Scott then and there well knew that the said expenses had not been incurred by said Edward F. Zap under and pursuant to the terms and conditions of said contract 83142, or otherwise or at all. All of which is contrary to the

statute in such case made and provided and against the peace and dignity of the United States."

Count 9 has been withdrawn from your consideration.

"Count 10.

"40. And the Grand Jurors aforesaid upon their [381] oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3 and 4 of Count I of this Indictment and do further present and indict:

"41. That on or about the 4th day of May, 1942, at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for approval and payment to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service, a false claim, well knowing the same to be false, fictitious, and fraudulent in the following manner and by the following means, to wit:

"42. On or about the 4th day of May, 1942, defendants Edward F. Zap and Lloyd Scott did present a false claim for reimbursement to

the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service. That said claim was false in that it purported to be a claim for moneys paid to one L. E. Reed pursuant to said contract 83142 for the construction [382] and fabrication of certain model airplane work commonly known as 'mock-ups.'

"43. Said defendants Edward F. Zap and Lloyd Scott well knew that said 'mock-ups' had not in fact been constructed pursuant to contract 83142 and that said 'mock-ups' had not been constructed by the defendants pursuant to any other contract with the United States Navy, and defendants well knew that in truth and in fact said 'mock-ups' had been used in certain private experiments of defendant Edward F. Zap. All of which is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

"Count 11.

"44. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate each and every allegation and statement contained in Paragraphs 1, 2, 3 and 4 of Count I of this Indictment and do further present and indict:

"45. That prior to the presentment of this Indictment and within one year thereof defend-

ants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify and conceal and cover up by trick, scheme, and device a material fact and make and cause to be made false and fraudulent statements and representations in a matter within the [383] jurisdiction of a department and agency of the United States, namely, the United States Navy, in the following manner and by the following means, to wit:

"46. On or about the 4th day of May, 1942, said defendants Edward F. Zap and Lloyd Scott did falsely represent to Hilton Byars who was then the Navy Cost Inspector that a receipt for moneys paid by them in the sum of $1100 given to defendants by L. E. Reed was a receipt evidencing expenses incurred and paid by said defendants pursuant to said contract 83142. That defendants well knew that said receipt was a matter within the jurisdiction of the United States Navy, and that the same was to be inspected by the United States Navy in order to determine the cost to said Edward F. Zap of performing said contract.

"47. Defendants Edward F. Zap and Lloyd Scott well knew that said representations were false in that not all the work was paid for with the moneys for which said receipt was given by said Reed was done pursuant to and in performance of contract 83142 and that approximately $700 of said work was done upon certain

private experiments of defendant Edward F. Zap and not pursuant to any contract to which the United States Government was a party. All of which is contrary to the statute in such case made and [384] *and* provided and against the peace and dignity of the United States."

Counts 12 and 13 are withdrawn from your consideration.

"60. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States."

Now, to each of those counts the defendant has pleaded not guilty.

By the finding of an indictment no presumption whatever arises to indicate the defendant is guilty or that he has any connection with or responsibility for the act charged against him. A defendant is presumed to be innocent at all stages of the proceedings until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt, and this rule applies to every material element of the offense charged. Mere suspicion or mere probability will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your minds when, after thoroughly and impartially examining all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt it must be such as you would be willing to act

upon on the most important and vital matters relating to your own affairs. Reasonable doubt is not a mere possibility or imaginary doubt or a bare conjecture, for it is difficult to prove a thing to be an absolute certainty. You [385] are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and accompanying all of the instructions that are given to you. If, upon consideration of the whole case, your are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, or any of them, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence.

You are the sole judges of the credibility and the weight which is to be given the different witnesses who testified upon this trial. In judging of the credibility of witnesses, you will have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be repelled by contradictory evidence, by the manner in which a witness testifies, by the character of his testimony, or by other evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it; as

may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the [386] stand, his intelligence, the relation which he bears to the parties to the action, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declarations of a lesser number or a presumption or other evidence which appeals to your minds with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side against the other. It does mean that you are not to decide an issue by the single process of counting the number of witnesses who have testified on opposing sides. It means that the final test is not in the relative number of witnesses but in the relative convincing force of the evidence. The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses testified to the contrary, if from the whole case, considering the credibility of the wit-

nesses, and after weighing the various factors of evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness. A witness false in one part of his [387] testimony is to be distrusted in others. That is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless from all the evidence you shall believe the probability of truth favors his testimony in other particulars.

The defendant has offered himself as a witness and has testified in this case. Having done so, you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness. It is proper to consider all of the matters that have been suggested to you in that connection, including the interests that the defendant may have in the case, his hopes and fears and what he has to gain or lose as a result of your verdict.

You are not limited in your consideration of the evidence to the bald expressions of the witnesses. You are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experiences as reasonable men.

Admissions of a defendant are to be received by you with caution.

You are instructed that if you believe that Edward F. Zap at all times acted in good faith and believed that his claims, accounts and statements

were true and correct, then the Government has failed in its proof, even though he may have been mistaken.

Evidence may be either direct or indirect. Direct evi- [388] dence is that which proves a fact in dispute directly and without any inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue but which affords an inference or presumption of its existence. Indirect evidence is of two kinds; namely, presumptions and inferences. A presumption is a deduction which the law expressly directs to be taken from particular facts. Unless declared by law to be conclusive it may be controverted by other evidence, direct or indirect, but unless so controverted the jury is bound to find in accordance with the presumption. An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from these facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature. The word "propensity" as used in these instructions means any natural or habitual inclination or tendency.

You are instructed that it is no offense under the statute to make a claim upon the Government for

the payment of a demand that is without merit unless the person who makes it understands at the time that he made it that it is a false, [389] fictitious or fraudulent demand and, therefore, intended to defraud the Government.

The gravamen of the offense is the wilful and deliberate presenting of the false claim. You are instructed that you have a right to take into consideration all of the facts with respect to the contractor's relation to the Government and whether, under all of the facts and circumstances of his relationship, it was reasonable to believe that he had filed a false claim with the Government. You have a duty to consider all of his transactions.

You are instructed that before the person charged can be convicted of wilfully filing a false claim, the Government must prove beyond a reasonable doubt that the accused presented the claim with a conscious knowledge that it was not true, and with the intent that it would be received as a statement of what was true in fact, well knowing that it was not true. To do a thing wilfully is to do it by design, with set purpose. It is incumbent upon the Government to prove the wilful intent.

The accused cannot be guilty of wilfully presenting a false claim where the claim is according to the belief and conviction of the accused as to its truth, and if you find from the evidence that the accused did not wilfully present a false claim, or if you have a reasonable doubt as to whether it was or was not wilful, you must acquit the accused. In other words,

if you find that the claim presented was ac- [390] cording to the belief and conviction of the accused as to its truth, even though in fact it was erroneous you must acquit the accused.

You are instructed that there is a very real and vital difference in simply doing an act and doing an act wilfully. In the first instance no bad intent or purpose is involved, while in the second instance of wilfully doing an act, the elements of guilty knowledge and bad purpose are involved and constitute the gist of the offense. The use of the word "wilfully" in that connection in an indictment implies not merely fraudulently doing an act, but also doing it with an evil intent and bad purpose to do wrong.

You are instructed that the word "wilful" is used in the statute in this case, and means a thing done without ground for believing it to be lawful, or conduct marked by careless disregard as to whether or not the thing done is lawful.

You shall not consider as evidence any statement of counsel made during the trial unless such statement was made as an admission or stipulation conceding the existence of a fact or facts. You must not consider for any purpose any evidence offered and rejected or which has been stricken out by the Court. Such evidence is to be treated as though you never heard it. You are to decide this case solely upon the evidence that has been admitted by the Court and the inferences that you may reasonably draw therefrom and such pre- [391] sumptions as

the law may deduce therefrom, as directed in my instructions and in accordance with the law as I state it to you.

At times throughout the trial the Court has been called upon to pass upon the question as to whether or not certain offered evidence might properly be admitted. With such rulings and the reasons for them you are not to be concerned. Whether offered evidence is admissible is purely a question of law, and from a ruling on such a question you are not to draw any inference as to what weight should be given the evidence or as to the credibility of a witness. In admitting evidence to which an objection is made the Court does not determine what weight should be given such evidence. As to any offer of evidence that has been rejected by the Court you, of course, must not consider the same. As to any question to which an objection was sustained you must not conjecture as to what the answer might have been or as to the reason for the objection.

In judging of the evidence you are to give it a reasonable and fair construction. You are not authorized, because of any feeling of sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you should reach a contrary conclusion. Whenever, after a careful consideration of all the evidence, your minds are in that state where a conclusion of innocence is indicated [392] equally with a conclusion of guilt, or there is a reasonable doubt as to whether

the evidence is so balanced, the conclusion of innocence must be adopted.

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me and none should be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and to regard each in the light of all the others.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict.

In determining what your verdict shall be you are to consider only the evidence before you. To the jury exclusively belongs the duty of determining the facts. The law you must accept from the Court as correctly declared in these [393] instructions.

You are instructed that if the Judge has said or

done anything which has suggested to you that he is inclined to favor the claims or position of either party you will not suffer yourself to be influenced by any such suggestion. I have not expressed nor intended to express, nor have I intimated, nor intended to intimate any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established, or what inferences should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

You must weigh and consider this case without regard to sympathy prejudice or passion for or against any party to the action. The attitude of the jurors at the outset of their deliberations is a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case, or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if and when shown that it is fallacious.

Remember that you are not partizans or advocates in this matter, but you are judges. The final test of the quality of your service will be in the verdict that you return to this court room, not in the opinions any of you [394] may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you

arrive at a just and proper verdict in this case. To that end, the Court would remind you that in your deliberations in the jury room that there can be no triumph excepting the ascertainment and declaration of the truth. It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous.

However, you should not be influenced to vote in one way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors.

Upon retiring to the jury room you will select one of your number to act as foreman who will preside over your deliberations, and who will sign the verdict to which you agree. As soon as you shall have agreed upon a unanimous verdict you shall have it signed and dated by your foreman and then shall return with it to this court room. [395]

Two verdicts will be handed to you, or two papers upon which the verdicts are to be rendered.

"In the District Court of the United States In and For the Southern District of California, Central Division.

No. 15728 Criminal

United States of America,

Plaintiff,

vs.

Lloyd Scott,

Defendant.

DIRECTED VERDICT OF THE JURY AS TO SCOTT

We, the Jury in the above-entitled case find the defendant Lloyd Scott not guilty on each of the 13 counts of the Indictment.

Dated, Los Angeles, California, April ... 1943."

Which verdict I instruct your foreman to sign and return into court. [396]

"In the District Court of the United States In and For the Southern District of California, Central Division.

No. 15728 Criminal

United States of America,

Plaintiff,

vs.

Edward F. Zap,

Defendant.

VERDICT OF THE JURY

We, the jury in the above-entitled case find the defendant Edward F. Zap"——

and then you will find a blank, and then after the blank the words will be "as charged in the first count of the indictment;" and in that blank you will write "guilty" or "not guilty," whatever is your determination, as to the first count, third count, fourth count, fifth count, seventh count, eighth count, tenth count and eleventh count; all of which are separately stated on this blank which will be handed to you.

"Dated, Los Angeles, California, April ....., 1943."

Then a line, and under the line is written "Foreman of the jury." Swear the bailiff.

Mr. Lavine: May it please the Court, before the jury retires may I approach the bench on certain exceptions to the instructions?

The Court: All right. [397]

DEFENDANT'S INSTRUCTION No. 1

The charge of filing a false claim means filing a claim that is willfully and deliberately false, and not one presented in error of the true facts or without willful design or intention of wrong doing. It is not the intent of the Government or the law that a mistake of fact, if you find that one did occur, constitutes a false claim, for in the course of business errors may occur. It is only where a claim is willfully and deliberately false that you can find a charge of presenting a false claim to be sustained by the evidence, and if the Government has failed to prove such willful and deliberate falsity, you must acquit the accused.

DEFENDANT'S INSTRUCTION No. 2

The gravamen of the charges in this case is the willful presentation of a false claim, well knowing the same to have been false. It is incumbent upon the Government to prove the element of willfulness, as I shall hereinafter define that word. It is also incumbent upon the Government to prove knowledge and deliberate acts on the part of the accused to present a false claim to the Government, with intent to defraud the Government. A claim which is in fact false or erroneous, and is presented inadvertently through mistake, or through lack of knowledge of the true facts, is not such a false claim as is contemplated by the statutes; and if you find from the evidence, or accidentally, or [398] without the knowledge or consent of Edward F. Zap, or with-

out any knowledge on his part that the claim was in fact false, you must acquit him.

DEFENDANT'S INSTRUCTION No. 3

You are instructed that mistakes of fact, or errors of fact, which were not committed wilfully and corruptly, but which may have been either the result of negligence or carelessness in coming to that belief or conclusion of the mind, without taking the proper pains to enable the accused to ascertain the correctness of the claim, do not make the claim corrupt, and such claim cannot be wilful or corrupt where the claim is according to the belief and conviction of the accused as to its correctness at the time he made it. Even if you find that the accused may have filed a claim rashly and inconsiderately, as to what they believed to be true, the claim would still not be wilfully false.

People v. Von Tiedeman, 120 Cal. 128, 136, 137

United States v. Shellmire, Bald. 370

DEFENDANT'S INSTRUCTION No. 7

The law does not require any defendant to prove his innocence, which, in many cases, might be impossible to do, but on the contrary, the law requires that the Government establish his guilt by legal evidence and beyond a reasonable doubt. The presumption of innocence with which a de- [399] fendant is at all times clothed is not a mere form to be disregarded by you at pleasure, but is an essential,

substantial part of the law, and is binding on you in this case, and it is your duty to acquit the defendant unless the evidence in this case convinces you of his guilt as charged beyond a reasonable doubt. If you can reconcile the evidence before you, upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that event find the defendant not guilty. You cannot find the defendant guilty unless from all the evidence before you, you believe him guilty beyond a reasonable doubt. [399-a]

DEFENDANT'S INSTRUCTION No. 8

A reasonable doubt is a doubt based on a reason and which is reasonable in view of all the evidence. If, after an impartial comparison and consideration of all the evidence, or from a lack of sufficient evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say you are not satisfied of the defendant's guilt and you have a reasonable doubt, your duty would be to acquit the defendant.

DEFENDANT'S INSTRUCTION No. 9

The good faith of the defendant Edward F. Zap is to be determined, and his acts and declarations are to be construed and interpreted in the light of his position as a scientist and as they appeared to him at the time of the occurrences. The defendant is not here on trial for errors or mistakes in the manner of handling accounts or for any inadvert-

ence or incorrect accounting. He is on trial for a criminal offense, the essential element of which is an evil or criminal intent. This the Government must prove to your satisfaction beyond a reasonable doubt and to a moral certainty, and if they have failed to do so then it is your duty to acquit the defendant.

[400]

DEFENDANT'S INSTRUCTION No. 11

You are instructed that Counts I, II and III charge the same offense in different language of the statute; that Counts IV, V and VI of the indictment charge the same offense in different language of the statute; that Counts VII, VIII and IX charge the same offense in different language of the statute; that Counts X, XI and XII charge the same offense in different language of the statute.

Each count must be considered by you as though it were a separate indictment but in connection with each count. It is your duty to acquit the defendant of all of the counts where you find that the evidence does not sustain them.

DEFENDANT'S INSTRUCTION No. 12

The intent of the defendant under the provisions of the law pursuant to which this prosecution is conducted is a material element necessary to prove the offense, and in arriving at a decision on that question all the facts and circumstances shown in the case as to the conduct of the defendant should be considered. If a man makes a claim which does not properly exist, but it appears that he had rea-

sonable grounds to believe that the claim was as he stated it, such statements and conduct are to be taken into consideration by you in determining whether they were innocent misstatements and were made in good faith. If such [401] claims or statements, alleged to have been falsely and fraudulently made were made in good faith and the defendant believed at the time that they were correct, or had reason to believe them to be correct, you must acquit him.

DEFENDANT'S INSTRUCTION No. 13

It is a complete defense to the charges alleged in the indictment that any claim or claims were signed through inadvertence, mistake or accident, and if you find from the evidence that any claim or claims were mistakenly signed under the wrong heading, or because they were mistakenly entered, you must acquit the accused.

DEFENDANT'S INSTRUCTION No. 14

The good faith of the accused in presenting a claim is always a matter to be considered by the jury, and if the jury finds that the accused acted in good faith, even though mistaken, you must acquit him.

DEFENDANT'S INSTRUCTION No. 16

You are instructed that a contractor has a right to rely on the system and procedure which the Government follows in the handling of its claims, and

he has a right to rely on the fact that any bills or requests for funds in a cost plus fixed fee contract must be first audited, inspected and approved by Navy cost inspectors, and if you find that [402] Edward F. Zap relied on such inspection and his belief in the accuracy of the approval of the Navy cost inspector, then you must acquit him of such charge or charges on which he so relied, even though in fact the cost inspector approved an erroneous item.

DEFENDANT'S INSTRUCTION No. 17

You are instructed that you must not bring in a verdict in this case to aid one department of the Government against the other.

DEFENDANT'S INSTRUCTION No. 18

You are instructed that you must not compromise your verdict, as to some counts for other counts.

DEFENDANT'S INSTRUCTION No. 19

The defendant Edward F. Zap adopts all of the general instructions pertaining to his case which are offered by defendant Lloyd V. Scott, as though offered by defendant Edward F. Zap and fully herein set out. This is done in order to save duplication of instructions.

DEFENDANT'S INSTRUCTION No. 19a

You are instructed that a contractor has a right to rely on his employees and his belief in the regu-

larity of [403] their transactions. It is a presumption of law that business transactions are regularly performed and carried out, and the contractor has a right to rely on this presumption, and if you find that Edward F. Zap relied on the presumption that his employee or employees were properly carrying out their work and making proper entries and proper check on the accounts, you must acquit him, even though it may be that he certified to some account or accounts as being correct when in fact they may have been incorrect. The law does not seek to punish a contractor for mere mistake of his employees or their inefficiency, but only provides that if a claim is wilfully false to the knowledge of the contractor, and the contractor has submitted a wilfully false claim with a design to cheat and defraud.

If you find in this case that Edward F. Zap had no intention to present a false claim, then you must acquit him, even though some item or items might be false or incorrect in fact.

DEFENDANT'S INSTRUCTION No. 18a

The submission of items to the Navy for its cost inspection is not a claim within the meaning of the statute. Nor is the approval thereof by the Navy a claim within the meaning of the statute. It is only the final voucher claim for bill which is presented after all of the inspection and audit is made that is the claim upon which the Government [404] may base the charge of presenting a false claim, and if such a claim was made only after due audit and in-

spection by the Navy itself and the accused had seen the approval by the Navy cost inspector of the item, and relied upon it as a certification that the claim was true and correct, even though the naval cost inspector was in fact mistaken, you must acquit the accused.

DEFENDANT'S INSTRUCTION No. 19

You are instructed that by making a claim as defined in the statute, is meant the asking or demanding on the part of the defendant from the Government of payment for services. It is not the preliminary request for audit or inspection and approval of the items that constitutes the making of a claim, but it is the actual claim itself after the same has been submitted for audit and approval and submitted to the Navy Department for payment, that constitutes the claim within the meaning of the statute.

United States v. Bittinger, 24 Fed. Cas. No. 14599

DEFENDANT'S INSTRUCTION No. 20

You are instructed that cost-plus-a-fixed-fee contract is somewhat analogous to a partnership. Under such an agreement the contractor and the Government work together for the attainment of the object of the contract. Such contracts are not let upon bid to the lowest bid, as was custo- [405] marily the case during past time. Instead of the bid method of letting a contract, the Government,

when using the cost-plus-a-fixed-fee method of contracting consummates the agreement by negotiation. In many cases the contract will be between two or more separate contracting firms acting jointly on the one hand, and the Government on the other. Again, under the cost-plus-a-fixed-fee contract the Government exercises constant control and supervision of the work during the entire life of the project. When the work is commenced the contractor may not even know the exact details of all the work to be done. It is a fact that in a great many of these contracts the contractor knows only the location and the general type of the work to be undertaken. Exact specifications are worked out as the work progresses. This is the antithesis of the procedure where the contract is upon a fixed fee. In the latter case the Government takes no supervisory interest in the contract. It lets the contract for a fixed price. When the work is completed and accepted the contractor is paid the fixed price and it is immaterial how much the contractor has paid for the work to be done for the Government must, in the event, pay the fixed price when the work is completed.

In a fixed price contract there is no relationship even remotely resembling a partnership between the Government and the contractor. Rather, the relationship is more [406] nearly that of a vendor and a vendee. In such a case the Government is only concerned with the fact that the work has been done according to the fixed fee.

The Government uses the fixed fee type of contract generally in cases where it desires the speediest method of accomplishing the desired work. The cost-plus-a-fixed-fee contract is one in which the Government lets certain work to a contractor and in effect says to the contractor, "You do the work, we will pay all costs of performance, and in addition, we will pay you a certain fixed fee." In the case of fixed fee contracts no Government supervision is necessary, and the contractor has a right to bill the Government for the fixed fee.

In the case of a cost-plus-a-fixed-fee contract the Government audits and re-audits and makes checks of it before payment is made.

If you find from the evidence that any of the accounts charged in the indictment were fixed fee accounts, or if you find that the contractor reasonably believed they were fixed fee accounts and charged them as such you must acquit him, if his claim was as to the fixed fee amount.

If you find from the evidence that the contractor, in filing a claim on accounts which were cost plus, did so based upon his belief as to the accuracy of the audit and inspection of his own auditor, as well as an audit and inspection by auditors acting for the United States Govern- [407] ment, and that he believed their audits represented a truthful and accurate check of the accounts, then you must acquit Edward F. Zap in this case.

DEFENDANT'S INSTRUCTION No. 21

You are instructed that you must take into consideration the fact that auditors and bookkeepers were charged with the duty of examining and inspecting the accounts, and advising Mr. Zap of their correctness or incorrectness, and you may take that into consideration in determining whether his acts were wilfully or corruptly done, or whether they were in good faith and to the best of his knowledge and belief, and if you find from the evidence that they were in good faith and that he acted to the best of his knowledge and belief, you must acquit the accused.

DEFENDANT'S INSTRUCTION No. 22

You are instructed that if there are two reasonable interpretations which you can place upon the evidence, one leading toward innocence and the other leading toward guilt, you must adopt that one leading toward innocence and reject that one leading toward guilt.

DEFENDANT'S INSTRUCTION No. 25

You are instructed that T.D. 5,000, which is a provision in the contracts between Edward F. Zap and the United States Government, provides as follows: [408]

"(d) Other manufacturing cost. — Other manufacturing cost as used in paragraph (b) of this section includes items of manufacturing costs which are not properly or satisfactorily chargeable to factory costs (see paragraph (c)

of this section) but which upon a complete showing of all pertinent facts are properly to be included as a cost of performing the contract or subcontract, as for instance, payments of royalties and amortization of the cost of designs and patent rights over their useful life; and 'deferred' or 'unliquidated' experimental and development charges. For example, in case experimental and development costs have been properly deferred or capitalized and are amortized in accordance with a reasonably consistent plan, a proper portion of the current charge, determined by a ratable allocation which is reasonable in consideration of the pertinent facts, may be treated as a cost of performing the contract or subcontract. In the case of general experimental development expenses which may be charged off currently, a reasonable portion thereof may be allocated to the cost of performing the contract or subcontract. If a special experimental or development project is carried on in pursuance of a contract, or in anticipation of a contract which is later entered into, and the expense is not treated as a part of general experimental and [409] development expenses or is not otherwise allowed as a cost of performing the contract, there clearly appearing no reasonable prospect of an additional contract for the type of article involved, the entire cost of such project may be allowed as a part of the cost of performing the contract."

Under the terms of this provision of the contract you are instructed that any experimental work done by Edward F. Zap in anticipation of a contract is a proper item chargeable to the Government of the United States.

DEFENDANT'S INSTRUCTION No. 27

If you find from the evidence that the charge for the flight test was for the flight test and insurance, and that the item of $4,000 was a fixed fee, or that Edward F. Zap had reasonable grounds to believe that it was a fixed fee, you must acquit him of Counts IV and V of the Indictment. [410]

DEFENDANT'S INSTRUCTION No. 28

Your are instructed that if you find that the defendant Edward F. Zap believed that the items were correctly made out by his bookkeeper or his accountants, or that he relied on them in the belief that the items were correct, you must acquit him.

DEFENDANT'S INSTRUCTION No. 29

You are instructed that if Edward F. Zap believed that the item of $4,000 was a fixed-fee, you must acquit him of the charge contained in Counts IV and V of the Indictment.

DEFENDANT'S INSTRUCTION No. 30

You are instructed that if Edward F. Zap honestly believed that he had a right to carry on experimental work under the terms and provisions of

Treasury Department 5,000 in advance of receiving a Government contract, and if you believe that he otherwise charged the Government only what he honestly believed to be due under the provisions of Contract NXs-4105, you must acquit him of Counts I and III of the Indictment. [411]

DEFENDANT'S INSTRUCTION No. 32

You are instructed that the item in the contract for flight test and insurance was a fixed fee, and therefore it was immaterial how the items were entered in the books, because it was a fixed item which the Government had to pay under the terms of the contract; therefore if you so find, it is your duty to acquit the defendant Edward F. Zap of Counts IV and V of the Indictment. [412]

(Whereupon, the following proceedings were had at the bench and outside the hearing of the jury:)

Mr. Lavine: Now my second exception, your Honor, is to the instruction in which you singled out the defendant in stating that his hopes, his fears, his previous relations to the case, and so forth, may be taken into consideration by the jury. It is an instruction singling out the defendant from other witnesses and the character of their consideration of his testimony.

The Court: Well, in other words, I should say that they are not to consider his hopes and his fears, is that it?

Mr. Lavine: No—yes, your Honor. That portion should have been omitted, and the statement is that the defendant must be considered the same as any other witness, under the same standards as any other witness.

The Court: In other words, a witness who is not on trial at all is to be judged in the same way as this defendant?

Mr. Lavine: The defendant's testimony is to be judged in the same way as any other witness.

Mr. Maury: I submit that any possible error, and we admit none, in that instruction was cured by the instruction to the jury generally that the jury are the sole judges of the credibility of the witnesses and that they may take into consideration the relation that each witness has to the case.

The Court: I took that from Judge James' instructions, as I remember it. [413]

Mr. Lavine: It is still a bad instruction, though.

The Court: Well, that's all right.

Mr. Lavine: Now the third exception, your Honor, is that one instruction that you gave at the very last of the instructions, regarding the element of wilfullness; that where the conduct of the defendant is marked by careless disregard as to whether his conduct is lawful. That is not a criminal standard of guilt. Careless disregard of truth even in a perjury case is not such an element as to make the offense wilful; and I could submit authorities on that, your Honor. That is a civil standard, and

very proper in a civil case, but not in a criminal case.

The Court: These are both criminal cases. The Supreme Court of the United States has sustained this. U. S. vs. Philadelphia Railway, 223 Fed. 207, at 210; and U. S. vs. Murdock, 290 U. S. 389; 54 Supreme Court 223.

Mr. Lavine: I will make my exception, your Honor.

The Court: Yes.

Mr. Lavine: All right. The next exception, your Honor, is the failure to give an instruction as to Treasury Decision 5000. We have a reference to it in the contract. The jury would not know the law with reference to it without an instruction as to the matter of law as to the terms of that section, and I think we are entitled to have that given to the jury.

The Court: What is the Government's position on that?

Mr. Maury: The Government's position there is this; [414] that the Treasury Decision 5000 is in the nature of a regulation; that the Court might give an instruction framed upon it, but to give the entire Treasury Decision itself would be so long and so involved as to serve no purpose whatsoever but to confuse the jury, and that the absence of such an instruction in no wise prejudices the Government's case.

Mr. Lavine: We only ask——

Mr. Maury: I mean in no wise prejudices the defendant's defense.

Mr. Lavine: It definitely prejudices the defense under the theory of the case as regards the cargo plane project, and we only ask for the giving of that one section relating to new projects.

Mr. Maury: Well, that one section itself relates to many other sections in the same Treasury Decision which were not read to the jury, and we submit should not be, any more than that one should have been read to the jury. The Government, of course, has no voice to cry error and can never appeal or anything of the sort, but we do feel it was error on the part of the defense counsel to arrogate to himself the supposed right to read to the jury what the law is.

The Court: Well, you have got your record on that, of course.

Mr. Lavine: Well, it definitely relates to the theory of the defense of this case, your Honor, and we have no other way of presenting it to the jury as a matter of law. [415] It is purely a question of law as to that portion of the contract. We have the contracts in evidence. The contract refers to those sections, and it relates to our theory of the defense, and we except to the failure to give that.

Mr. Maury: The Government reiterates its stand that the construction urged by the defendant is not a proper construction of the Treasury Decision.

The Court: Yes, it seemed to be quite broad, that any experimental work that was done by Edward F.

Zap was a proper item chargeable, which I think would take entirely away from the jury that entire question that they are supposed to have passed on. However, Mr. Lavine has made his record.

Mr. Lavine: Now we except to the refusal of each and every other instruction which the defense tendered and which the Court did not give on the ground that we have presented them to the Court and the Court has considered each of them and that they are a proper and correct statement of the law, particularly as relates to the defense theory of the case as presented in the evidence in this case.

Does your Honor desire me to point out each and every one of those instructions?

The Court: It is entirely up to you.

(The following defense instructions were refused.)

[416]

Mr. Lavine: May I have the refused instructions then? This is the time I have to do it.

Defendant's Instruction No. 1 which has been refused is a correct statement of the law as to what is a wilful and deliberate claim, and applies to the defense theory of the case.

Defendant's Instruction No. 2 points out the gravamen of the charge is the element of wilfulness and that even though a claim is, in fact, false or erroneous, if presented inadvertently, through mistake or through lack of knowledge of the true facts, is not such a false claim as contemplated by the statutes; and that is a correct statement of the law.

Defendant's Instruction No. 3, the principle in-

volved is that "even if you find that the accused may have filed a claim rashly and inconsiderately as to what they believed to be true, the claim would still not be wilfully false; and if the claim is a result of negligence or carelessness in coming to that belief or conclusion of mind, it does not make the claim corrupt and wilfully false."

Defendant's Instruction No. 7 is an instruction on the burden of proof on the Government, and is a correct statement of the law.

Defendant's Instruction No. 8 is a correct statement of the law.

Instruction 9 revolves around the defendant's good faith and that he is not on trial for errors or mistakes in the handling of accounts or for inadvertent or incorrect accounting. This was one of the theories of the defendant [417] in the case.

Defendant's Instruction No. 11 simply instructs the jury to take into consideration each count separately and independently, and is a correct statement of the law.

Defendant's Instruction No. 12 relates to the defendant's intent and that if he had reasonable grounds to believe that the claim was just, even though mistaken, it would not be a violation of the law.

Instruction No. 13 is to the effect that it is a complete defense to the charge alleged in the indictment that any claim was signed through inadvertence, mistake or accident, and that any claim or claims were mistakenly signed under the wrong heading.

would not warrant a conviction and would entitle the accused to an acquittal; is a correct statement of the law.

Defendant's Instruction No. 14 relates to the good faith of the defendant, even though mistaken.

Defendant's Instruction No. 17 relates to possible aiding one department of the Government against the other.

Defendant's Instruction 19 relates to not comprising the verdict.

Defendant's Instruction renumbered 19, the second No. 19, apparently, was merely an adoption of the instructions offered by counsel for the defendant Scott at the opening of the case as though given by the defendant Zap, and was merely offered to avoid duplication. [418]

Defendant's Instruction 16 relates to the defendant's theory of the case: that a person filing claims with the Government, a contractor particularly, has a right to rely on the system and procedure which the Government follows in the handling of its claims and he has a right to rely on the fact that those are audited, inspected and approved, and if he did so rely it would be his right to believe in the accuracy of the approval of the naval cost inspectors, it would entitle him to an acquittal, even though, in fact, the inspector approved an erroneous claim.

The second No. 19 here, which I would like the Court's permission to add an A to, so as to distinguish from the other 19——

The Court: Yes.

Mr. Lavine: 19-A is a statement that a contractor has a right to rely on his employees and his belief in the regularity of their transactions, and that it is a presumption of law that business transactions are regularly performed and carried out, and the contractor has a right to rely on this presumption; and is a correct statement of the law, as to the fact that the law does not seek to punish a contractor who relies on the presumption that his employees were properly carrying out their work, and that if there was no intent on the part of the contractor to defraud the Government he must be found not guilty.

Defendant's Instruction 18-A is an instruction that [419] the submission of an item to the Navy for its cost inspection is not a claim within the meaning of the statute, nor is the approval thereof by the Navy a claim within the meaning of the statute. It is only the final voucher, claim, or bill which is presented after all the inspection and audit is made that is the claim. This is a correct statement of the law and relates particularly to the defendant's theory of the case, and it is being refused.

Defendant's Instruction No. 17 is a definition of a claim within the meaning of the statute; not the preliminary audits or inspection, but the actual claim itself; and is a correct statement of the law and is not given.

Then there is an instruction offered as Defendant's Instruction 20, explaining as a matter of law the difference between a cost-plus-fixed-fee contract

and the fixed fee or fixed price contracts. This is a correct statement of the law and is not given.

Defendant's Instruction 21 is an instruction that the jury has a right to take into consideration the fact that auditors and bookkeepers were charged with the duty of examining and inspecting the accounts and in advising Mr. Zap of their correctness or incorrectness, and they have to take into consideration those facts in determining whether Mr. Zap's acts were wilfully and corruptly done.

Defendant's Instruction No. 22 involves the question of reasonable interpretation to be placed upon the evidence. [420]

The Court: Do you except to that?

Mr. Lavine: Your Honor didn't give it.

The Court: I certainly gave it, but I will strike it out.

Mr. Lavine: No, no, your Honor. I want that. Withdraw that objection to the instruction No. 22. I didn't notice that you had given it in substance, your Honor. I thought that was refused.

Defendant's Instruction 25 is the instruction relating to the definition of Treasury Decision 5000 referred to in the defendant's contract and necessarily a part of the applicable law for the jurors' consideration.

Mr. Maury: That has already been objected to, Mr. Lavine.

Mr. Lavine: What?

Mr. Maury: That has already been objected to.

Mr. Lavine: Defendant's Instruction 26 is an

instruction that relates to counts 10 and 11 as relates to the $350 item in the theory of the defendant's case; defendant's Instruction 27 relates to the $4,000 item in counts 4 and 5; and are correct statements of the law as to whether the contractor had reasonable grounds to believe it was a fixed fee.

Defendant's Instruction 28 is an instruction on the question of whether Mr. Zap believed that the items were correctly made out by his bookkeeper or accountant and he had a right to rely on that and to be acquitted if he did so rely. [421]

Defendant's Instruction 29 relates to the item of $4,000 as a fixed fee and if the jury so finds they must acquit him.

Defendant's Instruction No. 30 is an instruction as to whether Mr. Zap honestly believed he had a right to carry on experimental work under TD 5000 in advance of receiving a Government contract, and if he acted honestly in that belief they must acquit him.

Instruction 31 is an instruction as to if there was mere error in the item of Daggett Field the defendant must be acquittted of the counts concerned therewith.

Defendant's Instruction 32 is that if the item in the contract for flight test and insurance was a fixed fee in the contract, therefore, it was immaterial how the items were entered in the books because it was a fixed item and it would be their duty to acquit.

The defendant excepts to each and all of these

refused instructions, and the defendant further excepts to the Court's refusal to give a directed verdict on counts 4 and 5 in particular, on the ground that the indictment charges an item of $4,000, whereas the claim is for $4,300; and the indictment charges that the item——

Mr. Maury: This was not included in the motion. We object to the renewal of the motion for directed verdict at this time on different grounds.

Mr. Lavine: But we have a right to. [422]

The Court: I think counsel can put in the record the reasons he assigns. It may have some bearing.

Mr. Lavine: Also the refusal of the Court to direct the verdict on the ground that the item as far as McAvoy is concerned varied from the terms and facts alleged in the indictment.

The defendant also excepts to the refusal of the Court to direct a verdict as to each and all of the counts in the indictment remaining.

I think my record is complete now. Thank you, your Honor.

(Whereupon, the following proceedings were had within the hearing of the jury:)

The Court: Swear a baliff.

How about the exhibits, gentlemen?

Just a moment. How about the exhibits?

The Clerk: We have them here, your Honor, to go up, but I would like to go over them with counsel to be sure that none for identification are taken up into the jury room.

The Court: All right. Swear the bailiff.

(Bailiff sworn.)

(Whereupon, at 3:22 o'clock p. m., the jury retired to deliberate upon their verdict.) [423]

4:30 o'clock p. m.

(The following proceedings were now had without the presence or hearing of the jury:)

The Court: Gentlemen, I have the following request from the jury: "Please, 1: copy of the indictment, and 2: instructions of the Judge to the jury." Signed "Edwin S. Kirk, Foreman." What is your pleasure, gentlemen?

Mr. Lavine: As to the copy of the instructions, your Honor, if your Honor wishes to direct the court reporter to transcribe them and send them up, I certainly have no objections. I concur in that being done. As to the indictment, your Honor, it would seem that the indictment, as it now stands, should not be sent up. I don't see how we can segregate the objections that are withdrawn from the other objections. Mr. Reporter, how long would it take to transcribe the instructions?

The Reporter: Oh, it would take two hours, or more, your Honor.

Mr. Lavine: Does your Honor intend to send the jury to dinner?

The Court: No, not if they get through.

Mr. Maury: The Government feels that sending the indictment to the jury room, due to the obvious fact some of the counts in it have been dismissed; and, in view of counsel's objection to the procedure,

so far as the instructions are concerned, the position of the Government is, we [424] believe, that the State practice should not be followed in this matter. The State practice requires written instructions. I think it is the theory of the Federal practice in criminal cases that while the instructions may be suggested by both the defense and the Government, that the charge to the jury of the Court should be vocal, and such being the case the Government feels that if any instructions are to be read again to the jury, that the jury should be returned into court, and should inform the court on what they wish to be re-instructed, and then the Court should then repeat his charge on those points. We feel that is the time-honored method and that the Federal authorities sustain that position. The statute of California, I haven't it here, but I happen to be familiar with it; it is more or less a recent statute; I think it was enacted about 1935 or '37.

Mr. Lavine: Section 1127-B, your Honor?

Mr. Maury: It provides the instructions may be taken to the jury room.

The Court: 1137.

Mr. Maury: No question about that, but, as I say, the State practice there varies from that of the Federal Courts, or the common law as modified by Acts of Congress, which we are operating under in criminal procedure.

The Court: I am going to call the jury down and explain to them my position, the Court's position, which I have the sanction of both counsel in

with reference to the indictment. [425] And also the fact that it will take two hours, or more, to transcribe the instructions. Is that satisfactory to the Government?

Mr. Maury: Perfectly satisfactory.

The Court: Satisfactory to the defendant?

Mr. Lavine: Yes.

(The following proceedings were now had within the presence of the jury:)

The Court: Let the record show Government counsel, the Court, and defendant's counsel, and the defendant are in court.

Gentlemen of the jury, I have your memoranda:

> "Please, 1: copy of the indictment; 2, instructions of the Judge to the jury." Signed E. S. Kirk, Foreman."

Is that your request, gentlemen?

Jury Foreman Kirk: It is, your Honor.

The Court: Mr. Cross, will you file that with your file?

The Clerk: Yes, your Honor.

The Court: With reference to your request, gentlemen, for the indictment, I do not feel that it is proper to submit the indictment to you for the reason that a large number of the counts have been dismissed and withdrawn from your consideration. And it is the opinion of the Court that [426] they might be confused with some of the other counts, and the language that is in those counts should not be considered at all, and the indictment

being in one instrument I feel, gentlemen, that I should not submit the indictment to you.

With reference to the instructions, both the Government and the defendant are perfectly willing that you should have the instructions. However, the reporter advises me it will take about two hours to get the instructions typed for your consideration. Therefore, in view of that being satisfactory to both the Government and the defendant, if you would indicate to me what part of the instructions you have in mind, I will be very glad to read those portions.

Foreman Kirk: Your Honor, I think under the circumstances that if you would please read the indictment again it would clear up several points. We found in getting in the jury room——

The Court: Don't tell me any findings——

Foreman Kirk: No.

The Court: ——you just ask me what you want.

Foreman Kirk: Yes. It wasn't particularly clear to all concerned as to the difference between Count 1 and Count 3, to start out with.

The Court: Now, let me take care of that first.

"Count I. The Grand Jurors of the United States of America, duly impaneled, sworn and charged in the District Court of the United States for the Southern [427] District of California, Central Division, at the September 1942 Term of said Court, and inquiring for said District, do upon their oaths find and present as follows:

"1. At all times herein mentioned the defendant Edward F. Zap was and is a resident of and was doing business within the Southern District of California, Central Division, under the firm name and style of E. F. Zap Aeronautical Engineers.

"2. At all times herein mentioned the defendant Lloyd Scott was a Lieutenant Commander in the United States Navy and Assistant Chief Inspector of Naval Aircraft, Eleventh Naval District.

"3. At all times herein mentioned the United States Navy was a duly constituted and lawful department and agency of the United States of America, and it was a lawful function and duty of the said Navy to design and test naval airplanes.

"4. The United States of America on or about the 22nd day of March, 1941, and on or about the 15th day of May, 1942, in the City of Los Angeles, State of California, did make and enter into certain contracts with the said Edward F. Zap. Said contracts designated and known as NXs 4105 and 83142 provided among other things that the said Edward [428] F. Zap should engineer, design and build experimental aircraft and aircraft appliances for the United States Navy in consideration of the United States of America to compensate said Edward F. Zap by the payment of a fixed sum or sums for a certain portion or portions of

the work to be done and by the payment of other portions on the basis of cost plus a fixed fee to said Edward F. Zap.

"5. On or about the 23rd day of September, 1942, at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, all within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for payment and approval to an officer in the Naval Service of the United States of America a false claim upon and against the Government of the United States, well knowing the same to be false, fictitious and fraudulent, in the manner and by the means hereinafter set forth, to-wit:

"6. On or about the 23rd day of September, 1942, the defendants Edward F. Zap and Lloyd Scott did present to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San [429] Diego, California, who was then and there an officer in the United States naval service, a claim which falsely purported to be for reimbursement for expenses incurred pursuant to the aforementioned contract NXs 4105. Said expenses purported to be for the conducting of certain wind tunnel tests

by the University of Washington, under the terms and provisions of said contracts.

"7. Defendants Edward F. Zap and Lloyd Scott well knew that said claim was false and well knew that said tests had not been performed by the said University of Washington pursuant to contract NXs 4105 or any other contract with the United States Navy. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States."

Now, that is the end of Count 1. Now you ask for the re-reading of Count 3?

Foreman Kirk: Yes, your Honor.

The Court:

"Count III: 12. And the Grand Jurors aforesaid upon their oaths do hereby further indict and present: All of the allegations contained in Paragraphs numbered 1, 2, 3 and 4 of Count I of this Indictment are hereat realleged and incorporated by reference as if here set forth in full.

"13. Prior to the presentment of this Indict- [430] ment and within one year thereof, at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully and feloniously make and use and cause to be made and used a

false bill, receipt, voucher, roll, account, claim, certificate, and affidavit knowing the same to contain fraudulent and fictitious statements and entries in a manner within the jurisdiction of a department or agency of the United States of America, namely, the United States Navy in the following manner and by the following means, to wit:

"14. Prior to the presentment of this Indictment and within one year thereof, defendants Edward F. Zap and Lloyd Scott did apportion and cause to be entered upon the books and records of said Edward F. Zap false entries of and pertaining to sums of money paid to the University of Washington for conducting wind tunnel tests in such a manner as to falsely reflect and falsely represent that said moneys had been paid pursuant to the aforesaid contract NXs 4105 with the United States of America. That said entries upon said books and records were [431] false in that said sums of money had not been paid to the University of Washington, or anyone else, for conducting said wind tunnel tests for the benefit of the United States under said contract NXs 4105, or any other contract to which the United States was a party. That said books and records of said Edward F. Zap were matters within the jurisdiction of the United States Navy, in that by the terms and conditions of said contracts between the United States Navy and said Edward F. Zap, said

books were subject to scrutiny of and inspection by said United States Navy; that defendants well knew that said books and records of Edward F. Zap were to be inspected by the United States Navy for the purpose of determining the costs incurred by said Zap in performing said contracts.

"15. Said defendants Edward F. Zap and Lloyd Scott then and there well know that said book entries were false and that said moneys had not been expended pursuant to said contract NXs 4105, or any other contract to which the United States was a party. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States."

Now, that disposes of the indictment, gentlemen. All right. Now, will you indicate to me the instructions? [432]

Foreman Kirk: Well, your Honor, so far as the instructions are concerned, I think we can very well wait for those, and it was merely a matter of clearing up the Counts 1 and 3, which at the time I made a note of here, and I think that very nicely does it.

The Court: Rather than wait for two or three hours, if it is satisfactory to counsel for the Government and the defendant, I will re-read the instructions. Satisfactory, gentlemen?

Mr. Lavine: Yes, your Honor, and perhaps after you do that, if the jury still wants them, we

can have them transcribed and wait until the proper time for them, if they wish them.

Mr. Maury: Satisfactory to the Government, your Honor.

The Court: (At this time the Court re-read his instructions to the jury, and the same having previously been read to the jury are not here incorporated at this time.)

Foreman Kirk: Thank you.

Mr. Lavine: I will stipulate, your Honor, as soon as the reporter gets up the instructions that they may be taken into the jury room.

The Court: Is that satisfactory to the Government?

Mr. Maury: I suppose it is satisfactory to the Government. I think, however, that the jury, now that the instructions have been re-read by the Court, that that is not now necessary. [433]

The Court: Well, if they ask for the instructions, if they are typed, after they are finished I will let them have them.

(Thereupon the jury retired for further deliberations.)

11:12 o'clock p. m.

The Court: Gentlemen of the Jury, have you reached a verdict?

The Foreman: Yes, your Honor, we have.

The Court: Will you stipulate the jury are present, gentlemen?

Mr. Lavine: So stipulated.

Mr. Maury: So stipulated.

The Court: Stipulate the defendant is in court?

Mr. Maury: So stipulated.

Mr. Lavine: So stipulated.

The Court: Let the record show counsel for the Government and counsel for the defendant.

Will you hand it to the bailiff, please?

Mr. Clerk, read the verdict.

The Clerk: (Reading) [434]

"[Title of District Court and Cause.]

DIRECTED VERDICT OF THE JURY AS TO SCOTT

We, the Jury in the above-entitled case, find the defendant Lloyd Scott not guilty on each of the 13 counts of the Indictment.

Dated, Los Angeles, California, April 19, 1943.

Edwin S. Kirk, Foreman of the Jury."

"[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the Jury in the above-entitled case, find the defendant Edward F. Zap: [435]

Guilty as charged in the first count of the indictment.

Not guilty as charged in the third count of the indictment.

Guilty as charged in the fourth count of the indictment.

Guilty as charged in the fifth count of the indictment.

Not guilty as charged in the seventh count of the indictment.

Not guilty as charged in the eighth count of the indictment.

Not guilty as charged in the tenth count of the indictment.

Not guilty as charged in the eleventh count of the indictment.

Dated, Los Angeles, California, April 19, 1943.

Edwin S. Kirk, Foreman of the Jury."

So say all of you, gentlemen?

Jurors: Yes. [436]

Los Angeles, California, Thursday, April 22, 1943. 10:00 A. M.

The Clerk: 15728 Criminal, United States against Edward F. Zap; for sentence on Counts 1, 4 and 5.

Mr. Lavine: At this time, if your Honor pleases, the defendant, Edward F. Zap, moves for a new trial on all of the grounds set forth in the written motion and on the affidavit which is presented this morning, and also moves for arrest of judgment on all of the grounds set forth in the written motion.

If your Honor cares to hear further from Mr. Zap on that, we had such a short time, I would be glad

to put Mr. Zap on the stand and show your Honor the type of wind tunnel report which was received from the University of Washington and which was done by the workers of Mr. Zap, and the fact that we have enough reports in Commander Smith's bomb-proof shelter down there to fill up quite a sizeable space, in corroboration of the statements therein made.

The Court: Well, I thought that those reports were all made available to the defendant the second day of the trial. Were they not?

Mr. Lavine: No, your Honor, we weren't in that position. The matters that we had selected that were portable, as far as letters and documents were concerned, those were made available to us; but at the last time we were down in the bomb-proof shelter we found that all of the reports and [437] the various boxes which were described here were surrounded by a number of large boxes each containing 340 pounds of some kind of ammunition or something which had been stored in the same place, and it was absolutely impossible to get these moved. We were in trial practically every day here, and it was impossible to get at those particular matters which I feel the Court should be cognizant of at this time.

They would be corroborative of all of the statements herein made; that is to say, those particular items are wind tunnel reports of the students and people that were hired by Mr. Zap independently of the university and which were made up pursuant

to private employment rather than through the university. That situation started after Pearl Harbor, when the time of the university will be shown to have dropped from some 900 hours or more per report to about 150 to 200 hours, working over the same tunnel period of time.

I don't believe the books showed those items, your Honor. That was one of the points raised in this case, as to the expenditure by Mr. Zap of monies privately which he had taken with him; and, as a matter of fact, from the indictment, as I intend to point out later in the argument this morning, we were not apprized of the particular items we had to meet, and we did ask for a bill of particulars, which bill was denied to us, so that all we could do as far as the counts of this indictment were concerned, was to guess at what the Government intended to produce, and that guess was largely [438] incorrect in many respects. We were trying to figure out what the Government intended to prove under the indictment.

Now, your Honor, as we come to this phase of the case, and your Honor is the 14th juror, we really have some very serious problems of law and fact to consider, and I will be as brief as I can. In connection with this matter, your Honor, when this case started out it started out on the theory of a conspiracy between Scott and Zap. The Government's whole case proceeded under that evidentiary theory. The indictment alleged both of them jointly, and in connection with that matter the Government charged

them "Lloyd Scott and Edward F. Zap" and then proceeded under this evidentiary conspiracy theory. The evidence was presented through Champlin as to certain supposed conspiracy acts. Each of the counts was infected by that situation. We reached a point in the trial, your Honor, where there was, in fact, no proof as to Scott, and the Court then dismissed Scott and determined to direct the verdict as to Scott.

Now, what position did that leave Mr. Zap in, legally, as well as factually, your Honor? Legally it left him in the position of having been acquitted of a conspiracy as far as Scott is concerned, and in so far as the Government having proceeded on the theory of conspiracy in the entire case it left us in the position where we could not do anything else but leave it alone. The jury had all that evidence before it. Your Honor endeavored in every way to be fair in the [439] determination of the case, and your Honor endeavored in every way to try to balance the situation here, but what was left in the minds of the jury at that particular point? They had a situation there where you could not help but infer that inasmuch as Scott had been freed that Zap was still in the picture, and it left a necessarily serious inference as far as Zap was concerned; and I think the acquittal of one of the co-defendants under the circumstances entitled the other to the acquittal also on all of the counts.

Where there are two co-defendants and they tried on an evidentiary theory of conspiracy in the entire

case, and two defendants only, as here, then if one of the defendants is discharged it entitles the other one to a discharge.

Your Honor, the next point I wish to raise is a question, first, of the indictment itself, and, second, of the evidence in so far as a variance on the counts of the indictment as charged here.

I understood why the jury wanted to have the indictment reread to them, because after rereading it and rereading it it still leaves one in great uncertainty as to what the nature and cause of the accusation is under the Sixth Amendment to the Constitution of the United States. That Amendment, your Honor, is intended to provide a fairness in the preparation of a case which will enable a defendant to be prepared to meet the exact accusation.

Now, Paragraph 6 of the indictment says: [440]

> "On or about the 23rd day of September, 1942, the defendants, Edward F. Zap and Lloyd Scott did present to the disbursing officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States Naval Service, a claim——"

a single claim

> "——which falsely purported to be for reimbursement for expenses incurred pursuant to the aforementioned contract 4105. Said expenses purported to be for the conducting of certain wind tunnel tests by the University of Washington under the terms and provisions of

said contracts. Defendants Edward F. Zap and Lloyd Scott well knew that said claim was false and well knew that said tests were not performed by said University of Washington pursuant to Contract NXs 4105, or any other contract with the United States Navy."

Now, studying that provision we do not know what claim is intended. Your Honor is familiar with all those bank cases. Your Honor having been Comptroller, knows that where there is a charge of misappropriation of funds or a misstated report that the indictment must charge the particular funds that were misappropriated or the particular report that was misstated; otherwise how can a person be apprized of what he has to meet?

Now, reading this particular section it would appear to [441] me, your Honor, that it intended to refer to the work on the cargo plane, because it says, "well knew that said tests had not been performed by the University of Washington pursuant to Contract NXs 4105 or any other contract with the United States Navy." It concedes under that allegation that tests were made but says that they were not made pursuant to the contract. What else could that refer to except the cargo plane? That was the only thing that we could see that that indictment or that particular clause of the indictment referred to. Did it refer to all of these other things that they were bringing in, in which there was no allegation in the indictment? Your Honor asked the question during the course of the trial in the

early stages, "Was the cargo plane referred to there? Is that in issue here?" And I answered your Honor that it was, it was one of the important issues which the Government contended; and yet we have no allegation in the indictment that tells us that. We didn't actually know until the evidence was presented, your Honor, that that was one of the claims made by the Government against us; that that was one of the accusations which we had to meet. Certainly that particular indictment is too vague and indefinite to inform us of the nature and the cause of the accusation. And then we have the legal situation as far as the jury was concerned that in so far as the cargo plane was at issue, if that is what the Government meant there, and that is all I can take at the present time that they meant [442] under the very specific wording of Paragraph 7 there, that it was referring to some tests; then we were entitled to our requested instruction under TD 5000, which was a part of the issues presented to the Court and the jury in this particular case, and that became more important because the contract incorporates TD 5000 in the contract as a part of the contract.

The law of the case is a matter that the jury must take from the Court, and that was a part of the applicable law which the jury was entitled to have.

Now as to Count 1, your Honor, I believe that your Honor's careful consideration of the evidence as the 14th juror in this case will show that there was no work done that wasn't fairly and justly

charged to the Government and that it was a part of the work which was done pursuant to the contractor's understanding of the contract.

Now as to Counts 4 and 5, your Honor, those are both involving the same item; that is the $4,000.00 transaction with McAvoy.

Now, in the first place, your Honor, we must go back and present one phase of the matter which has been ruled on heretofore, but I deem it advisable to call it to your Honor's attention at this time. The check in that particular case was moved to be suppressed in the evidence on account of it having been illegally taken. The record shows that it was taken on November 5, 1942, separately and independently of [443] any other matters that were taken; that one of the agents of the F.B.I., without any search warrant or other document, went to an employee in Mr. Zap's place and secured the check, and that that check was not taken pursuant to any warrant or any other proceeding; that the check, therefore, should not have properly been in evidence and should not properly have been before the Court; it should have been suppressed.

Now that is the applicable testimony, your Honor, to Counts 4 and 5, and the question arises under this particular point as to whether that testimony is sufficient to sustain the charges contained in Counts 4 and 5.

There is a second point in connection with the charge in Counts 4 and 5, your Honor. Under Section 19 of the indictment the indictment alleges

defendant Edward F. Zap well knew, in fact, said William H. McAvoy had been paid by said defendants the sum of approximately $2,375.00 and no more for the said services pursuant to Contract 83142, and that no other and further expenses had been incurred by said defendants for the services of William H. McAvoy.

Now, that count also charges that the claim was for $4,000.00. That the claim for $4,300.00, and the amount proved by the Government in its own evidence was that the contract not only called for the payment to William H. McAvoy, but also called for the payment of insurance. The evidence adduced shows that at least $2,600.00 or $2,650.00 was paid to McAvoy in connection with his flight test. [444] The evidence further shows that considerable insurance was paid, and while the distribution on the books of that insurance is one thing, the fact of the situation is that there was $135.00 actually paid, there was an obligation incurred for $283.00 additional, there was also the actual expenses of all of the subordinate kinds of insurance which were included in the flight test and which the Kem Company and the books show amount to about $1,100.00 or $1,200.00 in addition to those two items of insurance; so that there was approximately $4,000.00 or $4,500.00, what the exact amount is I do not know, which was expended for that flight test and insurance.

The question arises, your Honor, under the applicable law as to whether an indictment which charges

—I might read another paragraph of Count 5 before I present the argument on that point. The indictment charges in Count 5 that said McAvoy did so endorse the same, referring to the check, and thereafter defendants filled the same in in the figure of $4,000.00. Now, there is no evidence that the defendant ever filled in the figures or ever directed the figure to be filled in in the sum of $4,000.00. There is not one word of evidence in this record to support that. "And thereafter the defendants presented the same to the bank upon which it was drawn for payment." Now, the evidence is contrary to that. It was not presented by the defendants to the bank. And then the indictment does not mention insurance but simply [445] mentions those facts, which, I have stated, the record is quite to the contrary.

So, your Honor, we have two particular points for your Honor's consideration in the matter of the motion for the new trial, and also in the matter of the arrest of judgment. I may say, your Honor, that your Honor has tried this case—there have been many other legal points which occurred which could be presented here and which your Honor considered during the course of the trial; the question of the admission of the books, the question of the failure to permit examination of Mr. Meyers on the issues of the unlawful search and seizure; those have been ruled on and I merely touch on those here at this time.

I may state, your Honor, that we have here a

very serious situation in so far as this defendant is concerned. The case started out, and we might speak frankly about it, with the idea of the Naval Intelligence perhaps after the co-defendant who was acquitted, and the case finally descended upon Mr. Zap as the sole defendant left in the case. I believe that the record shows and your Honor has had the opportunity to observe the great amount of work which this defendant has done for the Government of the United States. In connection with all of these matters he has worked day and night and very diligently, he has put in everything in his whole life in trying to accomplish the things which must be accomplished here, and it is indeed one of those types of [446] cases where I feel that if your Honor, considering all of the points raised heretofore and studying the indictment, studying the different points made here, I feel that justice will have been done if your Honor grants a motion for a new trial, or, not doing that, grants a motion in arrest of judgment for defects in the indictment and in the pleadings in the case and upon the matters herein raised. I feel that on the face of the record, your Honor, that there is, as to Counts 4 and 5, a fatality of proof. The charge as proved is not the charge as laid either in the means or in the amount, and I feel, your Honor, that if your Honor will consider and review in your mind all of the evidence and all of the work that was done here, and the objects which this contractor tried to accomplish, that the ends of justice would be met in such a disposition of the case.

The Court: You will recall, Mr. Lavine, that I called your attention when we discussed your Instruction 25 under TD 5000 that your instruction provided that any experimental work that was done by Edward F. Zap in anticipation of a contract was a proper item chargeable to the Government of the United States. In other words, you asked the Court to instruct the jury that any work that he did in contemplation of a contract, so that the issue was foreclosed if Mr. Zap just said that, "The test I made on that wheel, or some other part of the plane was in anticipation that I might get a contract in six months or a year," and took the matter, as [447] I read your proposed instruction, entirely from the jury. All he would have to say is, "I did that work in anticipation of a contract," leaving nothing at all for the jury under your proposed Instruction 25. In view of the fact that was the only one at this time, because you have saved all of your objections to the instructions that were not given and they are all in the record, but in view of the fact that you called attention to that one instruction I feel that I should reiterate again the position that I took on that, as well as my general objection to the instruction in view of the other instructions which were given in this case which I thought had covered all of the issues. But, as we all know, those are matters for other courts if counsel for the defendant is dissatisfied.

I will hear from the Government.

Mr. Maury: May it please the Court and opposing counsel:

Now counsel attacked Count 1 of the indictment which, as we all know, is framed under Section 80 of Title 18 of the United States Code. The statute more or less has directed the form of the indictment. The statute doesn't concern itself greatly or at all now with whether the money is actually paid or the amount thereof in terms of dollars; it concerns itself with the filing for approval of a false claim. That is alleged in Paragraph 5 very distinctly, in almost the language of the statute: [448]

> "The defendants" and so forth "did feloniously make and present and cause to be made and presented for payment and approval to an officer in the Naval Service of the United States of America a false claim upon and against the Government of the United States, well knowing the same to be false, fictitious and fraudulent, in the manner and by the means hereinafter set forth; that they presented to the disbursing officer a claim which falsely purported to be for reimbursement for expenses incurred pursuant to the aforementioned contract, NXs 4105, said expenses purporting to be for the conducting of ~~certain wind tunnel~~ tests at the University of Washington under the terms and provisions of said contract. The defendants Edward F. Zap and Lloyd Scott well knew that said claim was false, well knew that said tests had not been performed by the University of Washington pursuant to Contract NXs 4105, or any other contract, all of which is contrary to the statute."

Well, your Honor, the claim was presented, the tests had been performed on Project 15, and that was a cargo plane. There was no contract with the United States Navy. It may be a question of law whether or not the Treasury Decision 5000 permits a contractor to do that, but, at any rate, even from said Treasury Decision 5000 I believe the instruction offered [449] by the defendant is an erroneous interpretation of that Treasury Decision 5000, because that doesn't say or doesn't give any contractor a carte blanche right to go and experiment all over the face of the earth and then charge it to a particular contract that he has because he says it may be so charged.

Mr. Lavine: I believe, your Honor, the claim was for $4,300.00. I have been trying to find that.

Mr. Maury: The voucher was for $4,300.00, and attached to it was an invoice for $4,000.00. I stand corrected. The invoice is for $4,300.00, your Honor. The statement attached thereto states that McAvoy was paid $4,000.00 by Check No. 2679.

Mr. Lavine: The invoice, however, was for $4,300.00.

The Court: Motion for a new trial will be denied; exception allowed to the defendant.

Motion in arrest of judgment will be denied; exception allowed to the defendant.

It is the judgment of this Court on Count 1 that a fine shall be imposed of $2,000.00, and nine months in the County Jail; on Count 4, a fine of $2,000.00

and nine months in the County Jail; on Count 5, a fine of $2,000.00 and nine months in the County Jail; the County Jail sentences to run concurrently and not consecutively.

It is the further order of this Court that should an appeal be taken that the defendant be required to pay to the [450] clerk in escrow one-half, or the sum of $3,000.00. Under Rule 5 of the Supreme Court Rules of the United States in criminal proceedings, the statute provides that all of the fine the Court may require to be paid. [451]

EXCEPTIONS

1. The defendant excepts to the order of the District Court overruling the demurrer to the indictment.

2. The defendant excepts to the order of the District Court overruling the demurrer to the indictment on each and every ground thereof as to Counts 1, 4 and 5.

3. The defendant excepts to the order of the District Court in refusing the defendant a bill of particulars.

4. The defendant excepts to the order of the District Court in refusing the defendant the right to inspect the minutes of the Grand Jury to determine whether there has been an indictment based upon evidence in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

5. The defendant excepts to the order of the District Court on March 11, 1943, denying the defendant's motion to suppress the evidence and ordering of the same returned to the defendant.

6. The defendant excepts to the sufficiency of the affidavits in support of purported search warrants and to the ruling of the District Court holding that the said affidavits were sufficient. [452]

7. The defendant excepts to the order of the District Court in refusing to suppress and return a check for $4,000.00 on November 5th, from an employee of Edward F. Zap, to wit, F. O. Boyle, and in refusing to suppress the same in evidence.

8. The defendant excepts to the order of the District Court in refusing to allow Edward F. Zap to present oral testimony in behalf of his motion to suppress the evidence.

9. The defendant, Edward F. Zap, excepts to the refusal of the District Court to accept an offer of proof of the defendant herein as to the testimony that Murray B. Myerson and James C. Sloane, Department of Justice agents and in refusing to permit them to be called to the witness stand.

10. The defendant excepts to the order of the District Court granting a motion to strike the offer of proof of what the testimony of Myerson and Sloane would show as to their unlawful search and seizure of the offices and files of Edward F. Zap.

11. The defendant excepts to the order of the District Court in holding that the search warrants, which were based upon the unlawful search, could be used for the purpose of seizing the books and

records of Edward F. Zap. [453]

12. The defendant excepts to the order of the District Court in permitting evidence secured on a second search following a first illegal search to be used in evidence and in refusing to suppress the said evidence.

13. The defendant excepts to the order of the trial court in overruling defendant's objections that he was denied rights guaranteed to him under the Fifth Amendment to the Constitution of the United States.

14. The defendant excepts to the order of the District Court in refusing a continuance to the defendant in order to prepare his defense.

15. The defendant excepts to the order of the District Court in declining to order the return to the defendant until the date of the trial of all books, papers and documents which were in the possession of the Government.

16. The defendant excepts to the order of the District Court in denying defendant's motion to compel the Government to elect at the outset of the trial on what counts the Government was proceeding and in permitting a multiplicity of counts against the defendant as to each transaction and in splitting up the prosecution.

17. The defendant excepts to the order of the trial Judge in discharging juror number Two outside of the hearing of the defendant, and without his personal [454] consent and waiver.

18. The defendant excepts to the order of the trial court in refusing to strike Government Exhibit Number 7, to wit, a check for $4,000.00.

19. The defendant excepts to the order of the trial court in refusing to permit oral testimony to be taken during the trial regarding the illegal manner in which the Government's Exhibit No. 7 was procured and in refusing to entertain a motion during the trial to strike the said evidence and suppress it.

20. The defendant excepts to the order of the trial court in overruling the defendant's offer of proof during the trial as to the illegal search and seizure of the premises of Edward F. Zap and the illegal securing of the check for $4,000.00.

21. The defendant excepts to the order of the District Court in rejecting his offer of proof and denying his motion to strike the said evidence.

22. The defendant excepts to the order of the trial court admitting the testimony of various witnesses from the books so illegally searched and seized.

23. The defendant excepts to the order of the District Court permitting the identification of all the books, checks and records unlawfully seized in violation [455] of the Fourth and Fifth Amendments to the Constitution of the United States, and thereafter identified and offered in evidence.

24. The defendant excepts to the order of the District Court in permitting testimony from each of the items so designated.

25. The defendant excepts to the order of the District Court in denying the defendant's motion to compel the Government to elect on each and every

one of the counts in the indictment and in permitting the issues to go to the jury in duplicate, involving the same transaction under the same statute.

26. The defendant excepts to the order of the District Court denying the defendant's motion for a directed verdict.

27. The defendant excepts to the order of the District Court denying the defendant's motion to dismiss on the grounds of fatal variance between the pleadings and the proof.

28. The defendant excepts to the order of the District Court in overruling defendant's request to examine the Grand Jury transcript from which Government counsel was attempting to impeach defense witness McLaughlin.

29. Defendant excepts to the order of the District Court in admitting into evidence over defendant's ob- [456] jections all of the documents illegally searched and seized.

30. The defendant excepts to the order of the District Court in overruling the defendant's motion to instruct the jury to disregard the books and records seized, as irrelevant, incompetent, and immaterial.

31. The defendant excepts to the order of the trial court in declining to quash the indictment on the ground that the Grand Jury which indicted the defendant was not constituted in accordance with the provisions of Title 28, Section 411, U. S. Codes Annotated, and in granting the peal in abatement.

32. The defendant excepts to the order of the

District Court overruling objections of the defendant to the jurisdiction of the court to proceed on the ground that he was deprived of due process of law.

33. The defendant excepts to the order of the trial court in failing to direct the verdicts as to each count.

34. The defendant excepts to the order of the District Court in instructing the jury that it is proper for them to take into consideration the defendant's interest in the case and in singling him out for consideration.

35. The defendant excepts to the order of the Dis- [457] trict Court in instructing the jury that one is guilty of wilful filing of a claim where his "conduct is marked by a careless disregard as to whether or not the thing done is lawful."

36. The defendant excepts to the order of the District Court in overruling the defendant's motion for a directed verdict as to Counts 4 and 5 on the grounds that there was no proof of any claim of $4,000.00.

37. The defendant excepts to the order of the District Court in stating to the jury that it may disregard a portion of the indictment.

38. The defendant excepts to the order of the District Court in refusing to give defendant proper instruction on Treasury Decision 5000, which was a part of the contract.

39. The defendant excepts to the refusal of the District Court to give defendant's instruction No.

12, which points out that the gravamen of the charge is the element of wilfulness. That even though a claim, which is in fact false or erroneous, if present inadvertently through mistake or lack of knowledge, is not a false claim within the meaning of the law.

40. The defendant excepts to the refusal of the Court to give defendant's proper instruction No. 3. [458]

41. The defendant excepts to the District Court's refusal to give defendant's instruction No. 7.

42. The defendant excepts to the District Court's refusal to give defendant's instruction No. 9 as to good faith.

43. The defendant excepts to the District Court's refusal to give defendant's instruction No. 11 as to each count being considered separately.

44. The defendant excepts to the District Court's refusal to give defendant's instruction No. 12.

45. The defendant excepts to the District Court's refusal to give defendant's instruction No. 13.

45. The defendant excepts to the District Court's refusal to give defendant's instruction No. 14.

46. The defendant excepts to the District Court's refusal to give defendant's instruction No. 17

47. The defendant excepts to the District Court's refusal to give defendant's instruction No. 19.

48. The defendant excepts to the District Court's refusal to give defendant's instruction No. 19a.

49. The defendant excepts to the District Court's refusal to give defendant's instruction No. 18a.

50. The defendant excepts to the District Court's refusal to give defendant's instruction No. 20. [459]

51. The defendant excepts to the District Court's refusal to give defendant's instruction No. 21.

52. The defendant excepts to the District Court's refusal to give defendant's instruction No. 22.

53. The defendant excepts to the District Court's refusal to give defendant's instruction No. 25.

54. The defendant excepts to the District Court's refusal to give defendant's instruction No. 26.

55. The defendant excepts to the District Court's refusal to give defendant's instruction No. 27.

56. The defendant excepts to the District Court's refusal to give defendant's instruction No. 28.

57. The defendant excepts to the District Court's refusal to give defendant's instruction No. 29.

58. The defendant excepts to the District Court's refusal to give defendant's instruction No. 30.

59. The defendant excepts to the District Court's refusal to give defendant's instruction No. 32.

60. The defendant excepts to the District Court's refusal to give each and all of the other instructions offered by the defendant.

61. The defendant excepts to the District Court's refusal to grant a new trial on the grounds that the Fourth and Fifth Amendments to the Constitution of the United States were violated.

62. The defendant excepts to the District Court's [460] refusal to grant the motion in arrest of judgment.

63. The defendant excepts to the trial court's pronouncing of judgment and sentence.

MORRIS LAVINE

Attorney for Appellant. [461]

[Title of District Court and Cause.]

ORDER APPROVING BILL OF EXCEPTIONS

An order approving the Bill of Exceptions having been presented to this Court, and the Bill of Exceptions having been amended to correspond with the facts, and the Government and the defense having stipulated that the original exhibits shall be transmitted to the Ninth Circuit Court of Appeals and made a part of the record, and the same having been ordered and approved by the Ninth Circuit Court of Appeals, the said Bill of Exceptions, including such original exhibits as stipulated to, is now settled, signed, engrossed and made a part of the records within the term and within the time fixed by the United States Circuit Court of Appeals for the Ninth Circuit, together with the complete transcript of the testimony.

Dated: December 20, 1943.

J. F. T. O'CONNOR
United States District Judge

[Endorsed]: Lodged Oct. 25, 1943.

[Endorsed]: Filed Dec. 20, 1943.

[Endorsed]: No. 10419. United States Circuit Court of Appeals for the Ninth Circuit. Edward F. Zap, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 14, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Ninth Circuit Court of Appeals
of the United States of America

No. 10419

EDWARD F. ZAP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ASSIGNMENT OF ERRORS

The aggrieved by the decision, determination, judgments and proceedings had in the District Court of the United States, Southern District of California, Central Division, Edward F. Zap, Appellant herein, assigns the following errors in the proceedings and trial and judgments against him, which he avers occurred prior to and during the trial of the cause; said errors and each of them are to the great detriment, prejudice and injury of the defendant and appellant, and in violation of the rights conferred upon him by the Constitution and statutes of the United States of America, said errors are as follows:

ASSIGNMENTS OF ERROR

The Appellant assigns the following errors in the record:

1. The District Court erred in its decision overruling the defendant's demurrer to the indictment, and particularly the Counts 1, 4 and 5, on the grounds that counts 1, 4 and 5 failed to specify a public offense against the laws of the United States.

2. The District Court erred in its decision in holding that the indictment as to counts 1, 4 and 5 were not so vague, indefinite and uncertain as to fail to state a public offense, and erred in holding that the said indictment in each of the said counts apprised the accused of the nature and cause of the accusation so that he could meet it on the trial.

3. The District Court erred in its decision that the indictment in count 1 was sufficiently specific to enable the accused to know what claim or claims it is alleged that the defendant presented for payment and approval to an officer in the Naval Service, well knowing the same to be false, fictitious and fraudulent.

4. The District Court erred in its decision in holding that it was not necessary to specify the name of the officer and person or persons in the Naval Service to whom such a false claim was allegedly presented.

5. The District Court erred in its decision in failing to specify what claim was purported to be for reimbursement for expenses incurred, and for what the expenses were to be incurred, in conduct-

ing certain wind tunnel tests for the University of Washington.

6. The District Court erred in its decision in holding that it was not necessary for the Appellee to specify with definiteness and certainty the facts necessary to set forth the charges alleged in the indictment.

7. The District Court erred in its decision in overruling the demurrer to the indictment on each and every ground thereof as to counts 1, 4 and 5.

8. The District Court erred in refusing the defendant a bill of particulars as requested.

9. The District Court erred in refusing to grant the plea in abatement on the ground that the women were excluded from the Grand Jury.

10. The District Court erred in holding that the indictment did not, by reason of its vagueness and indefiniteness, violate the Fifth Amendment to the Constitution of the United States.

11. The District Court erred in its decision in failing to hold that the indictment by reason of its vagueness, indefiniteness and uncertainty, did not violate the Sixth Amendment to the Constitution of the United States.

12. The District Court erred in refusing to suppress the evidence on the grounds of its unlawful search and seizure.

13. The District Court erred in holding that the affidavit in support of the purported search warrants were sufficient upon which to base a search

and seizure under the Fourth and Fifth Amendments to the Constitution of the United States.

14. The District Court erred in refusing to allow the Appellant to produce oral testimony of F.B.I. Agents on the matter of the unlawful search and seizure.

15. The District Court erred in admitting in evidence and in refusing, during the course of the trial, to strike the testimony relating to a check for $4,000.00 unlawfully searched and seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

16. The District Court erred in refusing to permit the defendant to take oral testimony in the course of the trial regarding the unlawful search and seizure of the $4,000.00 check.

17. The District Court erred in admitting books and records in evidence over the objections that they were obtained in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and in refusing to suppress this evidence, and in refusing to order the return of said books and records to the Appellant under the Fourth and Fifth Amendments to the Constitution of the United States.

18. The District Court erred in the refusal to permit the filing of an offer of proof of the defendant herein as to the testimony of Murray B. Myerson and James C. Sloane, Department of Justice agents, regarding their unlawful search and seizure of a check for $4,000.00 which was used in evidence

against the Appellant under Counts 4 and 5 of the indictment.

19. The District Court erred in declining a continuance to the defendant at the outset of the trial to prepare his defense.

20. The District Court erred in denying defendant's motion at the outset to elect on what counts the Government was proceeding, and in permitting the Government to proceed on a multiplicity of counts against the defendant as to each transaction, and in splitting up the prosecution, on the grounds that this violated the defendant's rights under the Fifth Amendment to the Constitution of the United States and the statutes and holdings of the courts.

21. The District Court erred in excusing a juror outside of the hearing of the defendant, and without his personal consent and waiver.

22. The District Court erred in refusing to strike the Government's Exhibit No. 7, to wit, a check for $4,000.00.

23. The District Court erred in overruling the defendant's offer of proof during the trial as to the illegal search and seizure of the premises of Edward F. Zap, and the illegal securing of the check for $4,000.00.

24. The District Court erred in admitting the testimony of various witnesses from books illegally searched and seized from the premises of Edward F. Zap.

25. The District Court erred in refusing to com-

pel the Government to elect as to only one count on each transaction alleged in duplicate form.

26. The District Court erred in denying the motions of the defendant for a directed verdict.

27. The District Court erred in overruling the defendant's motion to instruct the jury to acquit on the grounds of variance between the pleadings and the proof.

28. The District Court erred in refusing to allow defense counsel to examine the Grand Jury transcript of the witness McLaughlin during the trial of the case and when the Government sought to impeach McLaughlin by his testimony before that body.

29. The District Court erred in admitting the books and records over objections that they were illegally searched and seized.

30. The District Court erred in instructing the jury that it may disregard that portion of the indictment referring to Lloyd B. Scott.

31. The District Court erred in overruling the defendant's objections to the admissibility of books and records on the ground that they were irrelevant, incompetent and immaterial, and that he had no knowledge of their contents.

32. The District Court erred in instructing the jury that it is proper for the jury to take into consideration the defendant's interest in the case, and in singling him out for consideration, to which exception was duly noted.

33. The District Court erred in instructing the

jury that one is guilty of a willful filing of the claim where "his conduct is marked by a careless disregard as to whether or not the thing done is lawful."

34. The District Court erred in refusing to give the defendant's proffered instruction as follows:

> "You are instructed that T.D. 5,000, which is a provision in the contracts between Edward F. Zap and the United States Government, provides as follows:
>
> '(d) Other manufacturing cost.—Other manufacturing cost as used in paragraph (b) of this section includes items of manufacturing costs which are not properly or satisfactorily chargeable to factory costs (see paragraph (c) of this section) but which upon a complete showing of all pertinent facts are properly to be included as a cost of performing the contract or subcontract, as for instance, payments of royalties and amortization of the cost of designs and patent rights over their useful life; and 'deferred' or 'unliquidated' experimental and development charges. For example, in case experimental and development costs have been properly deferred or capitalized and are amortized in accordance with a reasonably consistent plan, a proper portion of the current charge, determined by a ratable allocation which is reasonable in consideration of the pertinent facts, may be treated as a cost of performing the contracts or subcontract. In the case of

general experimental and development expenses which may be charged off currently, a reasonable portion thereof may be allocated to the cost of performing the contract or subcontract. If a special experimental or development project is carried on in pursuance of a contract, or in anticipation of a contract which is later entered into, and the expense is not treated as a part of general experimental and development expenses or is not otherwise allowed as a cost of performing the contract, there clearly appearing no reasonable prospect of an additional contract for the type of article involved, the entire cost of such project may be allowed as a part of the cost of performing the contract.'

"Under the terms of this provision of the contract you are instructed that any experimental work done by Edward F. Zap in anticipation of a contract is a proper item chargeable to the Government of the United States."

To which exception was duly noted.

35. The District Court erred in refusing to give the defendant's following proffered instruction:

"You are instructed that if Edward F. Zap honestly believed that he had a right to carry on experimental work under the terms and provisions of Treasury Department 5,000 in advance of receiving a Government contract, and if you believe that he otherwise charged the

Government only what he honestly believed to be due under the provisions of Contract NXs-4105, you must acquit him of Counts I and III of the Indictment."

To which exception was duly noted.

36. The District Court erred in refusing the following defendant's proffered instruction:

"If you find from the evidence that the charge for the flight test was for the flight test and insurance, and that the item of $4,000 was a fixed fee, or that Edward F. Zap had reasonable grounds to believe that it was a fixed fee, you must acquit him of Counts IV and V of the Indictment."

To which exception was duly noted.

37. The District Court erred in refusing the following defendant's proffered instruction:

"You are instructed that in Count I of the Indictment, it is alleged that on or about the 23rd day of September, 1942, the defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly and wilfully make and present, and cause to be made and presented for payment and approval to a naval officer, a false claim, well knowing the same to be false, fictitious and fraudulent. It is alleged in said count that the claim falsely purported to be for reimbursement for expenses incurred pursuant to Contract No. NXs 4105, and the Government charges that these tests were not performed pursuant to this

contract or any other contract with the United States Navy.

"If you find from the evidence that wind tunnel tests were made by Edward F. Zap at the University of Washington, pursuant to contracts with the United States Navy, and that the said experiments so conducted were a necessary part called for in the contracts with the Navy, or were a necessary development growing out of the work for the Navy, you must acquit Edward F. Zap."

To which exception was duly noted.

28. The District Court erred in refusing the following proffered defense instruction:

"The intent of the defendant under the provisions of the law pursuant to which this prosecution is conducted is a material element necessary to prove the offense, and in arriving at a decision on that question all the facts and circumstances shown in the case as to the conduct of the defendant should be considered. If a man makes a claim which does not properly exist, but it appears that he had reasonable grounds to believe that the claim was as he stated it, such statements and conduct are to be taken into consideration by you in determining whether they were innocent misstatements and were made in good faith. If such claims or statements, alleged to have been falsely and fraudulently made, were made in good faith and the defendant believed at the time that they

were correct, or had reason to believe them to be correct, you must acquit him."

To which exception was duly noted.

39. The District Court erred in refusing the following proffered defense instruction:

"The submission of items to the Navy for its cost inspection is not a claim within the meaning of the statute. Nor is the approval thereof by the Navy a claim within the meaning of the statute. It is only the final voucher claim for bill which is presented after all of the inspection and audit is made that is the claim upon which the Government may base the charge of presenting a false claim, and if such a claim was made only after due audit and inspection by the Navy itself and the accused had seen the approval by the Navy cost inspector of the item, and relied upon it as a certification that the claim was true and correct, even though the naval cost inspector was in fact mistaken, you must acquit the accused."

To which exception was duly noted.

40. The District Court erred in refusing the following proffered defense instruction:

"Where the accused had a right to rely on the accuracy of his own auditor, and also to rely on the accuracy of the inspection of a United States cost inspector, if you find that he did so rely upon the conduct of either or both and

acted in good faith in reliance on their conduct and inspection, you must acquit the accused."

To which exception was duly noted.

41. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that a contractor has a right to rely on the system and procedure which the Government follows in the handling of its claims, and he has a right to rely on the fact that any bills or requests for funds in a cost plus fixed fee contract must be first audited, inspected and approved by Navy cost inspectors, and if you find that Edward F. Zap relied on such inspection and his belief in the accuracy of the approval of the Navy cost inspector, then you must acquit him of such charge or charges on which he so relied, even though in fact the cost inspector approved an erroneous item."

To which exception was duly noted.

42. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that a contractor has a right to rely on his employees and his belief in the regularity of their transaction. It is a presumption of law that business transactions are regularly performed and carried out, and the contractor has a right to rely on this presumption, and if you find that Edward F. Zap relied on the presumption that his employee or employees were properly carrying out their work and making proper entries and proper check on

the accounts, you must acquit him, even though it may be that he certified to some account or accounts as being correct when in fact they may have been incorrect. The law does not seek to punish a contractor for mere mistake of his employees or their inefficiency, but only provides that if a claim is wilfully false to the knowledge of the contractor, and the contractor has submitted a wilfully false claim with a design to cheat and defraud *the*

"If you find in this case that Edward F. Zap had no intention to present a false claim, then you must acquit him, even though some item or items might be false or incorrect in fact."

To which exception was duly noted.

43. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that by making a claim as defined in the statute, is meant the asking or demanding on the part of the defendant from the Government of payment for services. It is not the preliminary request for audit or inspection and approval of the items that constitutes the making of a claim, but it is the actual claim itself after the same has been submitted for audit and approval and submitted to the Navy Department for payment, that constitutes the claim within the meaning of the statute.

United States v. Bittinger, 24 Fed. Cas. No. 14599."

To which exception was duly noted.

44. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that it is no offense under the statute to make a claim upon the Government for the payment of a demand that is without merit, unless the person who makes it understands at the time it is made that it is a false, fictitious or fraudulent demand and is therefore intended to defraud the Government."

United States v. Route, 33 Fed. 246."

45. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that you must not compromise your verdict as to some counts for other counts."

To which exception was duly noted.

46. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that a cost-plus-a-fixed-fee contract is somewhat analogous to a partnership. Under such an agreement the contractor and the Government work together for the attainment of the object of the contract. Such contracts are not let upon bid to the lowest bid, as was customarily the case during past time. Instead of the bid method of letting a contract, the Government, when using the cost-plus-a-fixed-fee method of contracting consummates the agreement by negotiation. In many cases the contract will be between two or

more separate contracting firms acting jointly on the one hand, and the Government on the other. Again, under the cost-plus-a-fixed-fee contract the Government exercises constant control and supervision of the work during the entire life of the project. When the work is commenced the contractor may not even know the exact details of all the work to be done. It is a fact that in a great many of these contracts the contractor knows only the location and the general type of the work to be undertaken. Exact specifications are worked out as the work progresses. This is the antithesis of the procedure where the contract is upon a fixed fee. In the latter case the Government takes no supervisory interest in the contract. It lets the contract for a fixed price. When the work is completed and accepted the contractor is paid the fixed price and it is immaterial how much the contractor has paid for the work to be done for the Government must, in any event, pay the fixed price when the work is completed.

"In a fixed price contract there is no relationship even remotely resembling a partnership between the Government and the contractor. Rather, the relationship is more nearly that of vendor and vendee. In such a case the Government is only concerned with the fact that the work has been done according to the fixed fee.

"The Government uses the fixed fee type of

contract generally in cases where it desires the speediest method of accomplishing the desired work. The cost-plus-a-fixed fee contract is one in which the Government lets certain work to a contractor and in effect says to the contractor, 'You do the work, we will pay all costs of performance, and in addition, we will pay you a certain fixed fee.' In the case of fixed fee contracts no Government supervision is necessary, and the contractor has a right to bill the Government for the fixed fee.

"In the case of a cost-plus-a-fixed-fee contract the Government audits and re-audits and makes checks of it before payment is made.

"If you find from the evidence that any of the accounts charged in the indictment were fixed fee accounts, or if you find that the contractor reasonably believed they were fixed fee accounts and charged them as such you must acquit him, if his claim was as to the fixed fee amount.

"If you find from the evidence that the contractor, in filing a claim on accounts which were cost plus, did so based upon his belief as to the accuracy of the audit and inspection of his own auditor, as well as an audit and inspection by auditors acting for the United States Government, and that he believed their audits represented a truthful and accurate check of the accounts, then you must acquit Edward F. Zap in this case."

To which exception was duly noted.

47. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that mistakes of fact, or errors of fact, which were not committed wilfully and corruptly, but which may have been either the result of negligence or carelessness in coming to that belief or conclusion of the mind, without taking proper pains to enable the accused to ascertain the correctness of the claim, do not make the claim corrupt, and such claim cannot be wilful or corrupt where the claim is according to the belief and conviction of the accused as to its correctness at the time he made it. Even if you find that the accused may have filed a claim rashly and inconsiderately, as to what they believed to be true, the claim would still not be wilfully false.

People v. Von Tiedeman, 120 Cal, 128, 136, 137;

United States v. Shellmire, Bald. 370.

To which exception was duly noted.

48. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that you must take into consideration the fact that auditors and bookkeepers were charged with the duty of examining and inspecting the accounts, and advising Mr. Zap of their correctness, and you may take that into consideration in determining whether his acts were wilfully or corruptly done, or whether they were in good faith and to the best

of his knowledge and belief, and if you find from the evidence that they were in good faith and that he acted to the best of his knowledge and belief, you must acquit the accused."

To which exception was duly noted.

49. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that before the person charged can be convicted of wilfully filing a false claim the Government must prove beyond a reasonable doubt that the accused presented the claim with the conscious knowledge that it was not true, and with the intent that it would be received as a statement of what was true in fact; well knowing that it was not true. To do a thing wilfully is to do it by design, with set purpose. It is incumbent upon the Government to prove the wilful element.

People v. Von Tiedeman, 120 Cal. 128, 135;
People v. Sheldon, 68 Cal. 434."

To which exception was duly noted.

50. The District Court erred in refusing the following proffered defense instruction:

"The accused cannot be guilty of wilfully presenting a false claim where the claim is according to the belief and conviction of the accused as to its truth, and if you find from the evidence that the accused did not wilfully present a false claim, or if you have a reasonable doubt as to whether it was or was not wilful,

you must acquit the accused. In other words, if you find that the claim presented was according to the belief and conviction of the accused as to its truth, even though in fact it was erroneous, you must acquit the accused.

People v. Von Tiedeman, 120 Cal. 128, 137."

To which exception was duly noted.

51. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that if you believe that Edward F. Zap at all times acted in good faith and believed that his claims, accounts or statements were true and correct, you must acquit him, even though he may have been mistaken.

United States v. Route, 33 Fed. 246.

"Where a person accused has acted in good faith, such a claim is not false or fictitious or based upon fraud, and if you find that the defendant Edward F. Zap acted in good faith you must acquit him.

6 Alaska, p. 736."

To which exception was duly noted.

52. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that the item in the contract for flight test and insurance was a fixed fee, and therefore it was immaterial how the items were entered in the books, because it was a fixed item which the Government had to pay under the terms of the contract; therefore if

you so find, it is your duty to acquit the defendant Edward F. Zap of Counts IV and V of the Indictment."

To which exception was duly noted.

MORRIS LAVINE
Attorney for Appellant

Received copy of the within Assignment of Errors this 25th day of October, 1943.

JAMES E. HARRINGTON,
per GRM
GEORGE R. MAURY
Special Assistants to the Attorney General

[Endorsed]: Filed Oct. 25, 1943. Edmund L. Smith, Clerk.

[Endorsed]: Filed Feb. 15, 1944. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

POINTS UPON WHICH APPELLANT INTENDS TO RELY

Appellant herewith adopts as points upon which he intends to rely in his appeal each and all of the points set out in his Assignment of Errors, and matters excepted to in the accord.

Dated: February 18, 1944.

MORRIS LAVINE
Attorney for Appellant

Received copy of the within this 19 day of February, 1944.

CHARLES H. CARR
United States Attorney
By JAMES McCARTY
Ass't United States Attorney

No. 10419

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD F. ZAP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF MOTION

To Special Assistant to the Attorney General, James E. Harrington, and Special Attorneys George R. Maury and Walter S. Binns:

Please Take Notice that on July 8, 1943, at the hour of 10:00 a.m., or as soon thereafter as the motion can be heard, the appellant in the above-entitled case will move the Ninth Circuit Court of Appeals of the United States, on the third floor of the Post Office Building in San Francisco, California, for an order to remand this case to the District Court of the United States, Southern District of California, Central Division, for further proceedings and for the taking of further evidence on a motion for a new trial, based upon evidence discovered since the trial of Edward F. Zap in said District Court. That the nature of said newly discovered evidence is as follows:

That a document presented to the court in support of the Government's contention that a false claim was presented in the sum of $4,000.00, was forged by a disgruntled employee in Mr. Zap's organization; that said forgery consists of typewritten matter, typed over the signature of appellant, who had signed his name in blank to papers to be used in filing routine reports on technical matters; that this document was presented in the trial of the case as part of Government's Exhibit 19, and that affiant did not ever see said document, as typed, before the trial of his case; that he was almost the last witness in the trial of the case, which

was conducted from 9:00 o'clock in the morning until 6:00 and 7:00 o'clock in the evening each day, and that the forgery and proof of the forgery was not discovered until after the trial had concluded and the appeal was taken.

That this supporting document was used to convict appellant and forms the basis of his conviction.

That all of appellant's papers and records were kept in the custody of Commander Smith of the United States Navy and appellant did not have access to all of his papers and files for a period of ten days before the trial commenced; that since the trial concluded he has been able to gather other proof and data showing that his conviction was based on forged testimony, and that the matters presented upon which he was convicted were false, forged and manufactured by persons in his employ who were hostile to appellant.

That all of these matters and the proof thereof are newly discovered and that appellant could not have presented them to the trial court at the time of trial. That in support of these matters appellant has engaged the services of Lawrence J. Buys, an expert on questioned documents, and attaches to this motion the affidavit of said Buys, which is made a part hereof.

Appellant therefore gives notice that he will ask the Ninth Circuit Court to remand the case to the United States District Court and to stay all proceedings in the Circuit Court of Appeals pending the decision and hearing in said District Court on

the motion for a new trial, and should the motion be granted, that the appeal then be dismissed, and should it be denied, that appellant complete his record on appeal thirty days after the ruling on the motion for a new trial.

MORRIS LAVINE,
Attorney for Appellant

Received copy of the within Affidavit this 3rd day of July, 1943.

UNITED STATES GOVERNMENT
By JAMES E. HARRINGTON,
Spec. Asst. to the Atty. Gen.

[Endorsed]: Filed July 6, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, deposes and says:

That he is the appellant in the above-entitled case. That the time within which appellant must lodge his bill of exceptions is set for July 15, 1943, and the time within which the same must be settled and filed is set by this court for July 30, 1943.

That affiant stands convicted of presenting a claim for $4,000 to the Navy falsely purporting to be for expenses incurred in connection with gov-

ernmental contracts, and with presenting a false and fraudulent statement to the Government in reference to this $4,000 item. That affiant was a contractor with many hundreds of claims for items of expenditure which were filed during the course of his business of doing aeronautical research for the United States Navy.

That during the trial of the case the Government presented and offered in evidence as a part of Government's Exhibit 19, a letter purporting to have come from appellant, which read as follows:

> "I, Edward F. Zap, do hereby certify that I have paid to William McAvoy the sum of Four Thousand and No/100 dollars ($4,000.00), as payment for Flight Testing of OS2U-2 under terms of Contract Nos. 83142, this being paid by my check #2679, dated 9-23-42.
>
> "EDWARD F. ZAP."

That since the trial of the action on which this appeal is based and the pronouncement of judgment, affiant has discovered that this document, which was relied on by the Government to form the basis of his conviction as to counts 4 and 5 of the indictment, is a forgery, and was manufactured and presented to the Government falsely to bring about his conviction.

That affiant did not see this document with the typing on it at any time before the trial of his case; that he recognized his signature, but none of the typing or any matters contained in the typing; that he first examined this document for the first

time when he was on the witness stand as one of the last defense witnesses in the case on April 16, 1943, and almost at the conclusion of the evidence, there being only one other witness, on either side, who testified briefly after affiant's testimony. That during the cross-examination affiant was asked to look at the document, which he then saw for the first time, and he testified as follows:

Q. Now, calling your attention to Government's Exhibit 19 in evidence, and to the last page thereof, is that your signature?

A. The signature looks like mine.

Q. Did you write it?

A. It looks like my signature, so I must have, but I want to call attention it looks strange to me.

Q. That paper looks strange?

A. This is what we're using in the stress reports. This is not our standard paper which we use for any kind of work.

Q. But it did come from your office?

Calling your attention to the document next before that in the same exhibit, is that your signature? A. This is my signature?

Q. Calling your attention to the document next before that, is that your signature?

A. Yes, this is my signature.

Q. And to the back of the document next before that, are those your signatures in two places?

A. Those are my signatures.

Q. Calling your attention to the front of the document, is that your signature?

A. Yes, this is my signature. May I see that?

This is definitely paper we use in the stress department.

Q. That is indicating the last sheet in the exhibit?

A. The last sheet. Which I usually, when I go on a trip, sign ahead of time for the stress department to fill its reports and send anything back to Washington.

Q. Do you wish to testify now that you did so sign that before it was filled in?

A. There is another thing that appears to me, October 13th. Any certification I made in the middle of summer was notarized by a notary public. We established a notary public right in our office. And that is missing on the document.

Q. But you wish to testify that you did or did not sign it before it was typed in?

A. Well, I merely report the facts as they appear to me.

Q. Yes?

A. It looks like my signature, and I suspect that that signature was put on that paper for the stress department and somebody has used that paper.

Q. You suspect that? A. I suspect it.

Q. Now that is your testimony.

(Rep. Tr. p. 1586 line 18 to p. 1588 line 11.)

That this testimony was given on the last day of the taking of evidence in the trial, and that the trial was conducted each day from 9:00 in the morning until 6:00 to 7:00 in the evening.

That since the conclusion of the trial affiant has extensively investigated this document and has em-

ployed Lawrence J. Buys, Examiner of Questioned Documents, to examine said document; that the document shows clearly that affiant's name was first written on the same and that the other matters therein were forged; that a copy of an affidavit by said Lawrence J. Buys is attached herewith and made a part hereof by reference, verifying these facts.

That affiant had certain employes in his concern who were endeavoring to get affiant into trouble, hoping thereby to gain control of his business enterprise, and that he so testified in the trial; that these said employees admitted hostility to affiant in the trial of the case and other employees testified as to the attempts of these two employees to undermine affiant and gain control of his business.

That many facts have been developed since the trial of the case showing that this document is a forgery and that it was designed to bring about the conviction of affiant.

That in addition to the proof of evidence manufactured by forgery affiant has been able to secure documents since the trial of his case that prove his complete innocence, as to each and every count. That these documents could not be secured by him during the trial, which was conducted each day from 9:00 in the morning until 6:00 and 7:00 in the evening, as they were in a bombproof shelter about twelve miles from the place of trial, and required an application to the Navy and Army to get access to them, and it was necessary to give such notice in advance in addition thereto. That about a week

before affiant's trial heavy boxes were placed in this bombproof shelter which could not be removed and which blocked access to any of the files and reports during that entire period and during the period of the trial.

That each and all of these facts can be presented to the trial court upon a remand of the case and further consideration by the trial court.

Wherefore, affiant prays that this Honorable Court withdraw the case from consideration on appeal and remand the same to the trial court for further consideration on motion for a new trial, and that the case be held in abeyance until the trial court passes upon this newly discovered evidence showing that affiant's conviction and sentence was based upon a forged document.

EDWARD F. ZAP.

Subscribed and sworn to before me this 3rd day of July, 1943.

[Seal] LUCILE TOWLES SUTHERLAND,
Notary Public in and for Said County and State.

Received copy of the within Affidavit this 3rd day of July, 1943.

UNITED STATES GOVERNMENT.
By JAMES E. HARRINGTON,
Spec. Asst. to the Atty. Gen.

[Endorsed]: Filed July 6, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF LAWRENCE J. BUYS

State of California,
County of Los Angeles—ss.

Lawrence J. Buys, being first duly sworn, deposes and says:

That he is an Examiner of Questioned Documents of more than sixteen years experience, during which time all of his working time was devoted exclusively to Questioned Document Problem Work; that he maintains an office and a completely equipped laboratory for the purpose of scientifically examining document problems submitted; that he has been called in by City, County, and Federal law enforcement agencies to examine documents in dispute or in question and report his findings; that he has testified as an expert on questioned documents in Municipal Courts and Superior Courts of Los Angeles County and other Counties of California; that he has testified as an expert on documents in other States of the Union and in Federal Courts; that he has testified as an expert on questioned documents before the Los Angeles County Grand Jury and other Grand Juries of California; that he has been appointed Court's Expert to examine documents and report his findings directly to the Court.

That he was requested by Morris Lavine, attorney for Edward F. Zap, to make a careful microscopic examination of Government's Exhibit #19

consisting of three pages of original typewritten and ink signatures and two pages of photostats.

That, in particular, he was requested to carefully examine that part of Government's Exhibit #19 reading:

> "I, Edward F. Zap, do hereby certify that I have paid to William McAvoy the sum of Four Thousand and No/100 Dollars ($4,000.00), as payment for Flight Testing of OS2U-2 under terms of Contract Nos. 83142, this being paid by my check #2679, dated 9-23-42.
> (Signed in ink) EDWARD F. ZAP
> Edward F. Zap
> October 13, 1942."

That the problem submitted was to determine, if possible:

(1) Whether this document was typewritten completely, including the line for signature, and the ink written signature "Edward F. Zap" then affixed thereto; or

(2) Whether the ink written signature "Edward F. Zap" was first affixed to this document in blank, and the typewritten contents subsequently typed thereon.

That in connection with this examination and study he prepared numerous photographic studies, these photographs being made at varying degrees of magnification and with varying light conditions; that these photographic studies included stereoscopic photographs of varying degrees of magnification for the purpose of recording third-dimensional

views of pertinent areas; and that for the purpose of allowing at least a partial study, photographically, of the problem at hand. A limited number of these photographs are attached hereto and made a part hereof.

That he aproached this problem with great caution, recognizing the seriousness of the problem at hand and the responsibility imposed upon him in accepting the task; and that he microscopically examined the original documents comprising Government's Exhibit #19, examined photographs made of these originals (including color films), and conducted Sequence Tests of Typewriting and Handwriting written by Edward F. Zap over varying periods of time under his direction before allowing himself to voice any definite conclusions. That this careful study was begun June 22, 1943 and not completed nor was any definite verbal opinion expressed until June 28, 1943.

(An exact size photographic reproduction of the questioned typewriting and signature "Edward F. Zap" is affixed immediately below and made a part of this affidavit:)

(For the photograph, see original affidavit transmitted as an exhibit to The Supreme Court of the United States with this Transcript.)

That as a result of these carefully conducted examinations and studies, it is his definite conclusion that the signature in question "Edward F. Zap" was first affixed to this document in blank and that

subsequently the signature was used to accommodate the typewritten wording now a part of the document in question.

That a second document (exact size photograph of which is affixed to this page and made a part of this Affidavit) served as one excellent examplar or standard of comparison, as it was also a part of Government's Exhibit #19 and contains an ink written signature "E. F. Zap" which contacts the typewriting in several areas, each of which is readily recognizable as showing a proper sequence of typewriting first and handwritten ink signature second, when viewed under a microscope or when properly magnified photographically.

(For the photograph, see original affidavit transmitted as an exhibit to The Supreme Court of the United States with this Transcript.)

That this undisputed physical evidence of typewriting first and ink writing afterward is clearly recorded by the fact that wherever this ink signature contacts the typewriting, the writing ink is repelled by the oil in the typewriting ink, giving the writing the appearance of having been written in segments above and below the areas of typewriting contacted, with no ink deposited on the typewriting or immediately adjacent thereto.

That a careful microscopic examination by a stereoscopic type microscope reveals great physical changes of the paper surface when struck by the horizontal bar character that makes up a typewrit-

ten signature line, thus: "_____"
That this change consists of a relatively deep impression into the surface of the paper into which a coating of oily typewriting ink is impressed, a 'indentation' or 'trench' that holds the oil of the ink for a considerable length of time before it absorbs into the paper; that as it absorbs into the paper it spreads up and over the edges of the 'trench' on the paper surface. That under these physical conditions, a handwritten signature ink is repelled by the oil, skips the 'trench' or indentation, drags some of the carbon of the typewriting ink along the line or writing, smashes the lower edge of the 'trench' in a down stroke or the upper edge in an up stroke as the pressure tears into the far bank of the impression or indentation, or in some other physical manner reveals the fact that the typewritten line was affected by the ink written line being made over it.

That when an ink written signature is placed on a paper in blank and typewriting signature line is then typed over that signature, the typewritten 'trench' or indentation is not affected by the pressure of the pen. The signature ink being already dry on the paper surface, is impressed into the paper surface under the typewritten impressions, and can be seen to approach the upper edge and emerge at the lower edge (in a down stroke) of the typewritten 'trench' without any distortion of the edges of that ink written stroke. Further, that when viewed with a transmitted light (light underneath the paper with a microscope focused on top

of the paper) the differentiating ink writing color can be seen to continue it's unbroken margins down into the 'trench' and up over the far edge and onto the level of the surface.

That a second standard or exemplar consisted of a series of staggered handwritten letters "Z", written under direction of the expert by Edward F. Zap, wherein a series of six sheets of paper containing typewritten signature lines and recording the date and time of day of the typewriting were handed to Mr. Zap with the instructions to sign a series of "Z's" on No. 1 sheet immediately, and to stagger the remaining five sheets by writing at varying times over a period of 24 hours, recording the date and time of day of each writing; and a second series of six blank sheets of paper with instructions to again stagger the "Y's" over a 24 hour period, after collecting which the expert typed signature lines across the handwritten "Y's", recording on each the date and time of day.

That in each instance these twelve exemplars clearly stamp the sequence of the ink and typewriting by one or more of the telltail physical evidences outlined herein.

That page (7) of this affidavit contains magnified photographs of the areas the letter "Z" in question crosses the typewritten signature line; and that page (8) contains magnified photographs of the areas the letter "Z" in signature "F. E. Zap" (exemplar) (see page (4)) crosses the signature line.

(For the photographs, see original affidavit transmitted as an exhibit to The Supreme

Court of the United States with this Transcript.)

That he has prepared and affixed to this affidavit in envelopes immediately below sterescopic photographs of contact areas of ink signatures and typewritings on questioned signature "Edward F. Zap" and exemplar signature "E. F. Zap", showing the contact of the down stroke in each instance with the typewritten line. This stereoscopic photograph in each instance is at the same magnification as the magnified photographs on pages (7) and (8) of this affidavit. (Area identified on reverse side of each.)

(For the photographs, see original affidavit transmitted as an exhibit to The Supreme Court of the United States with this Transcript.)

That in addition to the photographs made a part of this affidavit, he has prepared a complete photographic illustration of the physical evidences outlined herein, including a step by step series of stereoscopic photographs of all pertinent areas, which together with the series of Sequence Tests made under his direction by Edward F. Zap constitute, in his opinion, clear and definite proof of the conclusion he was forced by the evidence to arrive at, namely, that the questioned signature was first affixed to the questioned document in blank and that at some subsequent time the present type-

writing was added to complete the document in it's present condition.

Further affiant saith not.

LAWRENCE J. BUYS

Subscribed and Sworn to before me this 30th day of June, 1943.

[Seal] VENA M. McKAVISH,
Notary Public in and for the State of California,
County of Los Angeles.
My Commission expires June 11, 1947.

[Endorsed]: Filed July 6, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S RESPONSE TO MOTION TO REMAND

We append hereto copies of the three counts (counts I, IV, and V) of the indictment on which Zap was found guilty by the jury, together with a copy of the jury's verdict. Other counts had been removed from the jury's consideration.

COUNT I.

Under the first count, the evidence showed in brief that Zap had presented false claims to the Navy, totaling $1500.00, falsely alleged by him to have been for power expense at the University of Washington Wind Tunnel and paid directly to the power company in Seattle, Washington, by Zap; all in addition to the true bill for this expense in the

approximate sum of $1950.00, under his contract NXs-4105, with the Navy.

Since no attack is made on any of the evidence adduced to sustain this count, and since no specific "newly discovered evidence" is mentioned which would in anywise tend to relieve Zap of culpability under this count, we submit to the Court only the copy of Count I of the Indictment and of the verdict of the jury, with reference to this phase. (See Appendix hereto.)

COUNT IV.

Count IV charges the making and causing to be made, and presenting and causing to be presented for payment a false claim to the Navy.

One McAvoy was hired by Zap as a test pilot, at an agreed fee of about $2500.00. Zap prevailed upon McAvoy to endorse a blank check, then later had the check filled in for $4000.00 and ran it through his bank. This was used as the basis of the false claim, when in fact, McAvoy had been paid in full by cash and two other checks on another bank, all totaling no more than $2575.00. (Appendix.)

The testimony of McAvoy is herewith presented to the Court in full (Appendix) together with photostats of the check for $4000.00. It is notable that the $4000.00 check is correctly described in the questioned instrument by number and amount, and that McAvoy endorsed the $4000.00 check in blank upon the personal request of Zap. Zap too, on cross-examination (Appendix) testified that his original agreement with McAvoy contemplated the payment to McAvoy of about $2500.00 all told.

The questioned instrument is only one of a number of documents which all went together to make the false claim, all of which were signed by Zap, and the questioned document is a supporting document only. (Appendix.)

It is urged by the Government that the appellant's motion is insufficient in this respect in showing newly discovered evidence.

The only discovery set forth is that Zap's signature may have been attached to one questioned document in Government Exhibit 19, before it was typed.

No other "newly discovered" evidence is delineated to the court—only the vague statement that the defendant "has been able to secure documents since the trial of his case that prove his complete innocence as to each and every count." (Affidavit of Edward F. Zap, in this motion, page 5, lines 9-10.)

The "discovery" set forth raises nothing more than the suspicion of Zap, which was before the jury just as definitely as here. The affidavit of Zap and the affidavit of Buys create no new situation. No new facts are presented to the Court by which the Court can conclude anything except that the typed line beneath the signature was affixed after the signature—or, projecting this to an inference concerning the entire document, that all the typing was placed on the paper after the signature.

No showing is made that this was not done under Zap's authority; in fact, the showing is quite the reverse. The other documents of Exhibit 19, all signed by Zap, taken together are obviously de-

signed to fraudulently secure $4000.00 odd from the Navy as reimbursement for the test pilot's fee, when in fact, the test pilot had been paid only $2575.00 in all. Without the questioned exhibit, the false claim against the Navy was complete, and when coupled with McAvoy's testimony and that of Zap, it is ample to sustain the jury's verdict. The same suspicion was raised by Zap before the jury.

COUNT V.

The fifth count pertains to the same basic transaction, as it charges covering up by trick and device a material matter within the jurisdiction of the Navy.

An excerpt from the testimony of Thomas Cedric Browne, a Certified Public Accountant, who designed and supervised Zap's books is appended hereto showing that the falsely claimed $4000.00 was entered in Zap's books in the regular course of business.

A certified copy of a contract between the Navy and Zap was admitted in evidence—Naval Contract No. NOs 83142—which provided, among other things, in substance, that Zap's books and records should at all times be open to inspection and audit by the Navy—thus satisfying the statute that the matters were within the jurisdiction of the Navy—a department of the United States.

The appended excerpts from the testimony and photostatic copies of exhibits are submitted not as all of the evidence supporting the verdicts on counts IV and V, but as cross-sections, in order to enable the Court to understand the nature and tenor of the

evidence against Zap. It is necessarily incomplete, and the Government presents its apologies for omissions, all of which have been occasioned by the shortness of time available for the preparation of this Response.

APPELLANT'S DILIGENCE IS LACKING

The indictment was returned November 25, 1942. The trial commenced April 6, 1943.

Appellant Zap makes no showing, either in this Court or the Court below, that he made any application to the lower Court, during the interim, for permission to inspect any of his documents in the possession of the Navy prior to March 30th, 1943. This showing was made in the lower Court by affidavit of Zap, in support of a motion for continuance of the trial, which was denied by the trial Court.

It is submitted that the motion to remand be denied.

JAMES E. HARRINGTON,
Special Assistant to the
Attorney General
GEORGE R. MAURY,
Special Attorney
TOM C. CLARK,
Assistant Attorney General

(Clerk's Note: The appendix to this response consisted of Counts I, IV and V of the indictment; the verdict of the jury; the judgment and commitment; excerpts from testimony of various witnesses;

and photostatic copies of Government's Exhibits 19 and 7; Exhibit 19 containing the questioned documents. The original exhibits in the case are being transmitted to The Supreme Court of the United States; all other items in this appendix are printed as a part of the transcript of record.)

[Endorsed]: Filed July 6, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California;
County of San Francisco—ss.

Edward F. Zap, being first duly sworn deposes and says:

That he is the appellant and petitioner herein.

That at the time of the trial of his case, and particularly at the time of the motion for a new trial, the evidence which the Government claimed was a violation of Count I was the alleged engineering by affiant of a cargo plane; that it was claimed that affiant charged the Government with wind tunnel fees for said cargo plane when said plane was not a part of the work contracted for by the United States Navy; that the Government labeled this work as Project 15, and claimed that Project 15 was not part of the work done under contract.

That affiant was unable at the time of trial to secure certain records, documents and papers which would demonstrate conclusively to the jury that this work was done pursuant to Navy contracts; that

all of affiant's books, records and papers were taken by the Navy to a bombproof shelter in the Douglas Aircraft Corporation plant; that affiant went to the Douglas plant a few days before the trial, expecting to have said files and records readily available to him, but that instead, they were surrounded by boxes containing ammunition and other materials, and that they weighed 310 pounds each; that affiant was informed that it would be impossible to move the boxes or for him to have access to his records and files for a period of at least ten days; that when the trial commenced affiant moved for a continuance because of the unavailability of his files and records to him, which continuance was denied.

That the trial lasted each day from nine and nine-thirty to six and six-thirty in the evening; that affiant was therefore unable to get certain papers and records which establish that the so-called Project 15 was a project authorized by contracts with the United States Navy and related to a flight wing for the Grumman Navy fighting plane, which design would, when constructed, accommodate two cannons in the wing besides six machine guns and which was a new type of wing being offered to the United States Navy; that special secrecy was attached to it.

That since the trial of the case affiant has had these documents, records and papers available to him and has submitted reports from them to the United States Navy and has received approval by the Navy of his wind tunnel reports and verification as to each of these tests being under the specific

terms of his contract with the Navy; that such reports and such approval were not available to him at the trial but have since become available to him and constitute new evidence material to his case, which could not with reasonable diligence have been secured and presented at the time of the trial.

That the following documents are now available which were not available at the time of trial, and which could not with reasonable diligence have been secured at the time of trial, and which would have established the correctness and accuracy of each charge made to the Government:

1. Letter from the University of Washington, Department of Aeronautical Engineering, Seattle, dated Feb. 18, 1942;

2. Accounting forms (C-4) and (C-5), and invoices on Contract No. 4105, complete and billed to the United States Navy, and public vouchers made up from these invoices, will be brought to the court at request, since they are too bulky to be copied and appended. These are listed below as follows:

Invoice numbers 71, 70, 67, 66, 65, 64, 60, 55, 54, 52, 44, 43, 32, 30, and 12 invoices dated June 29, 1942, which cover the complete billing on Contract 4105, from the beginning of the contract until invoice 71, dated Nov. 23, 1942.

In addition to these invoices, the (C-4) and (C-1) forms which were ever issued on Contract 4105, as follows:

(Z) 2, 6, 8, 12, 15, 17, 28, 29, 30, 31, 32, 35, 37, 39, 42, 47, 49, 50, 57, 61, 63, and (X) 1 through 22 inclusive.

3. Wind Tunnel Reports 154-A, 154-B, 173, 177, 178, 183, 188, 189 and 190, which cover all the work done at the University of Washington Wind Tunnel from Dec. 1, 1941 until July 28, 1942, as outlined in the UWAL letter of Feb. 18, 1943. This covers five distinct testing periods at various times as follows:

Period A. December 1 through 5, 1941.

Period B. February 24 through 28, 1942.

Period C. March 2 through 16, 1942.

Period D. May 12 through 16, 1942.

Period E. July 20 through 24, 1942.

COUNTS IV and V.

Affiant states that with reference to these counts the evidence shows without conflict that affiant signed checks and papers in blank for the convenience of his office staff, especially when he was out of the city; that he received a blank check before he went to Dagget Field for a flight test and after carrying said check around for several days in his pocket, signed it in blank, and the flight test pilot also signed it in blank, and affiant turned it over to his bookkeeper; that thereafter affiant was not even in the city.

That affiant's bookkeeper took orders from one Harry Champlin and Cedric Brown, a certified public accountant; that the evidence shows that Harry Champlin tried to get control of affiant's business and thought he could accomplish this by getting affiant arrested.

That affiant is informed and believes, and therefore alleges that the bookkeeper inquired of either Harry Champlin or Cedric Brown how she should fill in the blank check, and that she filled it in pursuant to instructions she received from them and not from affiant; that she so testified in the trial, and that her testimony and the testimony of others in connection with this transaction is appended hereto as a part of this additional affidavit and made a part of these proceedings. The testimony of the certified public accountant, Cedric Brown, and the testimony of said Harry Champlin is also attached hereto and made a part of these proceedings.

That the basis in the evidence for the allegations of the Government that affiant personally claimed $4,000 was the forged document typed over affiant's signature, and which was sent to the Navy contrary to the usual form and custom of filing these claims. That this forged document was at the time of its presentation to the court and jury the only correspondence of affiant which appeared to be an alleged claim for $4,000.

Further affiant sayeth not.

EDWARD F. ZAP

Subscribed and sworn to before me this 26th day of July, 1943.

[Seal] (Signed) PAUL P. O'BRIEN,
Clerk, United States Circuit Court of Appeals for the Ninth Circuit.

Morris Lavine, being first duly sworn, deposes and says:

That prior to trial he asked Special Assistant Attorney George W. Maury, representing the government, to see the documents and papers which the government had in its possession regarding Edward F. Zap; that Mr. Maury took affiant and his client, Edward F. Zap and opened a drawer of a filing cabinet and stated "Here are all the documents you are entitled to see" and that these documents consisted of such books, records and papers which the government's agents had taken from the defendant's place of business or residence; that affiant did not at that time or until the trial see government's exhibit 19 which contains the forged document in question. That in fact affiant was told upon his visit that the government counsel were having trouble getting the documents and records from Washington; that the record shows Exhibit 19 to be a government exhibit from Washington.

MORRIS LAVINE

Subscribed and sworn to before me this 26th day of July, 1943.

[Seal] (Signed) PAUL P. O'BRIEN,
Clerk United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed July 26, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, July 26, 1943.

Before: Denman, Mathews and Stephens,
Circuit Judges.

[Title of Cause.]

ORDER DENYING MOTION FOR ORDER TO REMAND CAUSE TO DISTRICT COURT FOR FURTHER PROCEEDINGS, ETC.

Ordered motion of appellant for order to remand cause to District Court for further proceedings, and for taking of further evidence on a motion for new trial, etc., presented by Mr. Morris Lavine, counsel for appellant, in support of said motion, and by Mr. George Maury, Special Assistant to the Attorney General, counsel for appellee, in opposition thereto, and submitted to the Court for consideration and decision.

Upon consideration thereof, Further Ordered said motion to remand be, and hereby is denied.

Upon application of Mr. Lavine, Further Ordered time within which appellant may lodge his proposed bill of exceptions and file his assignments of error be, and hereby is extended to and including September 1, 1943.

July 27, 1943

To the Clerk of the Ninth Circuit Court of Appeals:

Please enter an exception to the order of the Ninth Circuit Court of Appeals denying my motion to remand the case of Edward F. Zap vs. U. S. to the District Court of the United States, Southern District, Central Division, for hearing on motion for new trial based upon discovery of forgery in document relied on by government for conviction.

MORRIS LAVINE
Attorney for Edward F. Zap

[Endorsed]: Filed July 27, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, March 15, 1945.

Before: Mathews, Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Morris Lavine, counsel for appellant, and by Messrs. James E. Harrington, Special Assistant to the Attorney General, and Alden F. Houck, Special At-

torney, Department of Justice, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, June 4, 1945.

Before: Mathews, Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

By direction of the Court, Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: Mathews, Stephens and Healy, Circuit Judges.

Mathews, Circuit Judge.

OPINION

Appellant and Lloyd Scott were indicted in 13 counts. Counts 1-12 charged violations of § 35(A) of the Criminal Code, 18 U.S.C.A. § 80. Count 13 charged a violation of § 37 of the Criminal Code, 18 U.S.C.A. § 88. Appellant and Scott pleaded not guilty and were tried. In the course of the trial, counts 2, 6, 9, 12 and 13 were dismissed. Scott was acquitted on all remaining counts. Appellant was acquitted on counts 3, 7, 8, 10 and 11, was convicted and sentenced on counts 1, 4 and 5, and has appealed.

As to count 1, appellee confesses error and consents to a reversal of the judgment.[1]

Appellant filed with the clerk of the trial court

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[1]Appellee's brief states that "there is a real question as to whether the charge in [count 1] was sufficiently definite and certain as to apprise [appellant] with sufficient particularity of the crime with which he stood charged," and that, "For this reason * * * the Government [appellee] will not resist the appeal on count 1."

an assignment of errors[2] whereby—in numbered paragraphs called assignments—52 alleged errors were assigned. Appellants' counsel has filed with the clerk of this court 20 copies of a printed brief,[3] but the brief does not contain a specification of errors.[4] Errors assigned, but not specified, may be

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[2] By Rules 8 and 9 of the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilty, 18 U.S.C.A. following § 688, the appellant in a criminal case is required to "file with the clerk of the trial court an assignment of the errors of which he complains." Rule 2(a) of our rules governing criminal appeals provides: "The appellant shall file with the clerk of the trial court an assignment of errors, numbering each, and shall set out separately and particularly each error asserted and intended to be urged."

[3] Rule 20 of our general rules provides:

"1. Counsel for the appellant shall file with the clerk of this court 20 copies of a printed brief * * *

"2. This brief shall contain * * * *.

"(e) In admiralty and criminal cases, a specification by number of such of the assigned errors as are to be relied upon, with reference to the pages of the record where the assignments appear. Thereafter each such assignment shall be printed in full preceding the argument addressed to it. Where the specified error is more than two printed pages in length, it may be summarized before the argument addressed to it, in which event the specified assignment must be printed in full in an appendix. * * * "

[4] See paragraph (e), supra.

deemed waived.[5] Therefore we might well disregard the 52 assignments of error in this case.[6] However, we have not disregarded them, but have considered them, and, so far as they relate to counts 4 and 5, find not merit in them.

Judgment reversed as to count 1 and affirmed as to counts 4 and 5.

[Endorsed]: Opinion. Filed June 4, 1945. Paul P. O.'Brien, Clerk.

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[5] Love v. United States, 9 Cir., 74 F. 2d 988; Lonergan v. United States, 9 Cir., 88 F. 2d 591; Muyres v. United States, 9 Cir., 89 F. 2d 783; Waggoner v. United States, 9 Cir., 113 F. 2d 867; Roubay v. United States, 9 Cir., 115 F. 2d 49; Utley v. United States, 9 Cir., 115 F. 2d 117; Lane v. United States, 9 Cir., 142 F. 2d 249; Roedel v. United States, 9 Cir., 145 F. 2d 819.

[6] See cases cited in footnote 5.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10419

EDWARD F. ZAP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed as to count 1 of the indictment and affirmed as to counts 4 and 5 of the indictment.

[Endorsed]: Filed and entered June 4, 1945. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, September 13, 1945.

Before: Mathews, Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed July 5, 1945, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eight hundred and nine (809) pages, numbered from and including 1 to and including 809, to be a full, true and correct copy of the entire record, excluding certain original exhibits transmitted herewith, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 1st day of October, 1945.

[Seal] PAUL P. O'BRIEN,
Clerk

SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

ORDER ALLOWING CERTIORARI—Filed January 7, 1946.

A petition for rehearing having been submitted in this case;

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari entered December 10, 1945, be, and the same is hereby vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted, limited to the question whether books and records relating to the petitioner's contract with the Navy Department were properly admitted as evidence at his trial. The case is assigned for argument immediately after No. 404.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.